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LEGAL DEPARTMENT

CASES ON THE LAW OF PUBLIC SERVICE

CASES ON THE LAW
OF
PUBLIC SERVICE

BY
CHARLES K. BURDICK
PROFESSOR OF THE LAW OF PUBLIC SERVICE IN
CORNELL UNIVERSITY, COLLEGE OF LAW

UTAH POWER & LIGHT COMPANY,
LEGAL DEPARTMENT

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CASES ON THE LAW OF PUBLIC SERVICE.

CHAPTER I.

THE BASES OF THE DUTIES OF PUBLIC SERVICE.

Section 1.

The Common Callings.

ANONYMOUS.

Y. B. 19 H. VI 49, pl. 5. 1441.[1]

Newton, C. J. My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse dies; shall the plaintiff have an action? I say, No.

Paston, J. You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*.

Newton, C. J. If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me.[2]

RICH *v.* KNEELAND.

Croke Jac. 330. 1613.

Action on the case. Whereas the defendant was a common bargeman, and used to carry for hire from London to Milton, and

[1] The case as here given is taken from Professor J. B. Ames' article on The History of Assumpsit, in 2 Harvard Law Review, 1, 3.— Ed.

[2] "If . . . one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the

other places in Kent; that he delivered to him a portmanteau and thirty pounds therein to carry, and gave to him twopence for the carriage; and that the defendant *tam negligenter custodivit,* that it was taken from him by persons unknown, and so he lost it.

The defendant pleads, confessing the receipt, that he was a common bargeman; but that he, fearing to carry it, delivered it to J. D. to carry, and that he gave notice thereof to the plaintiff, and he agreed thereto, and discharged him of the carriage.

The plaintiff traverses that he did not discharge him.

It was thereupon demurred: and adjudged for the plaintiff; for the delivery by his assent is not material: but the only matter traversable is the discharge, which is issuable; and found for the plaintiff.

A writ of error being brought, it was assigned, *First,* Because this action lies not against a common bargeman without special promise. But all the justices and barons held that it well lies as against a common carrier upon the land. *Secondly,* They held that the traverse was good. Wherefore the judgment was affirmed.[1]

NOTA.

Keilwey, 50. 1450.

NOTE, that it was agreed by all the court, that where a smith declines to shoe my horse, or an innkeeper declines to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in covenant. But where a carpenter makes a bargain to build me a house and does nothing, no action on the case, because that does sound in covenant. But if he builds the house badly, the action on the case is good. Note, that in this case a man shall have no action against the innkeeper, but shall make complaint to the ruler, by 5 Ed. 4. fol. 2. *Contra,* 14 H. 7. fol. 22.[2]

other expressly assumed the risk himself, or unless the peculiar nature of one's calling . . . imposed a customary duty to act with reasonable skill." J. B. Ames, The History of Assumpsit, 2 Harvard Law Review, 1, 3.

[1] "An express assumpsit was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things entrusted to them. . . . This act of taking possession of the goods, his assumpsit to keep them safely, and their subsequent loss by his default, together made up the tort. . . . Bailees whose calling was of a quasi-public nature were chargeable by the custom of the realm, without any express undertaking." J. B. Ames, The History of Assumpsit, 2 Harvard Law Review, 1, 4 to 6.

[2] After some vacillation it was established that *mere* breach of a special assumpsit was not actionable, J. B. Ames, The History of Assumpsit, 2 Harvard Law Review, 1, 10 and 11, but it appears *supra* that the breach

JACKSON *v.* ROGERS.

2 Shower, 327. 1683.

ACTION on the case, for that whereas the defendant is a common carrier from London to Lymmington *et abinde retrorsum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, *Chief Judge*, that the action is maintainable, as well as it is against an innkeeper for refusing guests, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

NOTE, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.[1]

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3 BLACKSTONE'S COMMENTARIES 165.

"There is also in law always an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but, in order to charge him with damages, a special agreement is required. Also, if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller."

of an assumpsit formed an essential element in several rights of action, and it further appears that very little in the nature of active misconduct was necessary in addition to the breach of an assumpsit to constitute a cause of action. In 1488 BRIAN, C. J., said: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance." Y. B. 3 H. VII, 14, pl. 20.

[1] "An action upon the case lyeth against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging; because he hath subjected himself to keep a common inn." Anonymous, Godbolt 335, pl. 440.

REX *v.* IVENS.

7 C. & P. 213. 1835.[1]

INDICTMENT against the defendant, as an innkeeper, for not receiving Mr. Samuel Probyn Williams as a guest at his inn, and also for refusing to take his horse. The first count of the indictment averred that the prosecutor had offered to pay a reasonable sum for his lodgings; and the first and second counts both stated that there was room in the inn. The third count omitted these allegations, and also omitted all mention of the horse. The fourth count was similar to the third, but in a more general form. Plea — Not guilty.

It was opened by *Whitmore,* for the prosecution, that the defendant kept the Bell Inn, at Chepstow, and that the prosecutor Mr. Williams had gone there on horseback, on the night of Sunday the 14th of April; and that the defendant and his wife both refused him admittance into the inn.

Godson, for the defendant. Does your lordship think that an indictment lies against an innkeeper for refusing to receive a guest? I know that an action may be brought against him if he does so; and such an action was brought against an innkeeper at Lancaster a few years ago. This is only, at most, a private injury to Mr. Williams, and not an offence against the public.

COLERIDGE, J. There can be no doubt that this indictment is sustainable in point of law. Mr. Serjeant Hawkins distinctly lays it down that an indictment lies for this offence.

Godson. My friend Mr. *Whitmore,* has said nothing about any offer of the price of the entertainment, which Mr. Serjt. Hawkins states to be necessary to sustain an indictment.

COLERIDGE, J. There may be facts in this case which may make the tender of reward unnecessary.

Mr. Samuel Probyn Williams was called. He said, "I am the clerk of Mr. Charles Holden Walker, the solicitor of Newport. On Sunday night the 14th of April, at a few minutes before 12 o'clock, I applied for admission at the Bell Inn, which is kept by the defendant. I had applied at the George, but that was shut up. At the Bell there was a light up stairs, in the room over the parlour. I asked to be admitted, and the defendant's wife said the house and stables were both full. I assumed that the statement was correct, and went away to the Beaufort Arms, and I rode

[1] The form of the indictment, which is given in a footnote in the report, is here omitted.— ED.

also to two or three inns. The Beaufort Arms was shut up, and some of the other inns had no stables. I returned to the Bell, and I told the defendant's wife that I knew the house was not full, and that I was entitled to shelter for the night, and I insisted on it. I could not see if she was dressed, but I believe she and her husband were in bed. She asked my name, and I said that that could be no difference to her. She said if I would tell my name, she would ring a bell for one of the servants. I told her my name was Williams. She asked where I lived, and I said it was no difference to her. I afterwards told her I came from Newport. She shut down the window, and said she did not know me, and should not open the door. I knocked my stick against the window shutters, and the defendant looked out at the up-stairs window. I told him if the house was full, I could take a chair, and he might put my horse in a shed which I knew they had; and I also knew that they had twelve stalls of stabling. I again urged my right to shelter, and he said he would not come down for any one." In his cross-examination he said, "It was near one o'clock when I went to the defendant's house the second time. Two writs were to be executed at Chepstow on the Monday, one a writ of trial, and another a writ of inquiry, and I was to be there on Sunday evening. I went by way of Redwick, and the road was bad, and that it was that made me so late. I had not been drinking. I at first objected to give my name; and when I did give it, and my address, I might have added, 'and now you are as wise as you were before;' but I did not add the words, 'and be damned to you.' I did not offer any payment; but they must know that a person who had a horse could pay. I was not angry. I got shelter two miles off, and I was near two hours in Chepstow." In answer to a question put by the learned Judge, he said, "There was no objection made that I did not tender any money."

Godson, for the defendant. It appears to me to be rather too much to say that an innkeeper is bound to keep his house open till 12 o'clock at night to allow attorneys' clerks to travel about on Sundays. I should submit that the law never can require an innkeeper to keep open his house till midnight, more especially on a Sunday. It is admitted that the prosecutor did not tender any money or make any offer of payment. And further it will be proved, that the prosecutor conducted himself so as to be unfit for admission into any respectable house. I submit, that even in the day-time an innkeeper is not bound to receive a guest who is drunk or insolent, or who swears at either him or his wife. And if in this case it is shown that Mr. Williams did so, that will be an answer to the case. In addition to all these facts, it appears that the prosecutor

refused to tell his name. This was a further reason why the defendant should not admit him into his house; for if inn-keepers were compellable to admit all sorts of suspicious characters into their houses at unseasonable hours of the night, there would be a great probability that they would find, when they got up in the morning, that their houses had been robbed.

For the defendant, Thomas Price was called. He said, "I reside at Chepstow, opposite to the Bell. In April last, I was disturbed in the night; I was asleep, and I heard a loud noise of tapping at a door. I thought it at my house, and went to my window. I heard Mrs. Ivens ask a person his name. The answer was, 'What is that to you about my name.' Mrs. Ivens said, 'At such a late hour I want to know your name, and where you come from.' The person replied, 'If you must know my name, it is Williams, and I come from Newport; and now you are as wise as you were before, and be damned to you.' Mrs. Ivens then shut the window. I thought the person was either drunk or mad." In his cross-examination this witness said, "I believe Mrs. Ivens said the person was no gentleman. It quite turned my spirits to hear such a bad expression as he used."

COLERIDGE, J. (in summing up). The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to this case is this: — that an indictment lies against an innkeeper, who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants,[2] they having in return a kind of privilege of entertaining travellers, and supplying them with what they want. It is said in the present case, that Mr. Williams, the prosecutor, conducted himself improperly, and therefore ought not to have been admitted into the house of the defendant. If a person came to an inn drunk, or behaved in an indecent or improper manner, I am of opinion that the innkeeper is not bound to receive

[2] In Ansell *v.* Waterhouse (1817), 2 Chit. 1, HOLROYD, J., said: "This is an action against a person [a common carrier], who, by ancient law, held as it were a public office, and was bound to the public."

In Jeremy on Carriers, p. 59, it is said of a common carrier that he is "to be considered in the light of a public servant, and as such liable to an action for refusing to take charge of the goods."

him. You will consider whether Mr. Williams did so behave here. It is next said that he came to the inn at a late hour of the night, when probably the family were gone to bed. Have we not all knocked at inn doors at late hours of the night, and after the family have retired to rest, not for the purpose of annoyance, but to get the people up? In this case it further appears, that the wife of the defendant has a conversation with the prosecutor, in which she insists on knowing his name and abode. I think that an innkeeper has no right to insist on knowing those particulars; and certainly you and I would think an innkeeper very impertinent, who asked either the one or the other of any of us. However, the prosecutor gives his name and residence; and supposing that he did add the words "and be damned to you," is that a sufficient reason for keeping a man out of an inn who has travelled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house. It has been strongly objected against the prosecutor by Mr. Godson, that he had been travelling on a Sunday. To make that argument of any avail, it must be contended that travelling on a Sunday is illegal. It is not so, although it is what ought to be avoided whenever it can be. Indeed there is one thing which shows that travelling on a Sunday is not illegal, which is, that in many places you pay additional toll at the turnpikes if you pass through them on a Sunday, by which the legislature plainly contemplates travelling on a Sunday as a thing not illegal. I do not encourage travelling on Sundays, but still it is not illegal. With respect to the non-tender of money by the prosecutor, it is now a custom so universal with innkeepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case, no objection was made that Mr. Williams did not make a tender; and they did not even insinuate that they had any suspicion that he could not pay for whatever entertainment might be furnished to him. I think, therefore, that that cannot be set up as a defence. It however remains for me next to consider the case with respect to the hour of the night at which Mr. Williams applied for admission; and the opinion which I have formed is, that the lateness of the hour is no excuse to the defendant for refusing to receive the prosecutor into his inn. Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times,

when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive. The only other question in this case is, whether the defendant's inn was full. There is no distinct evidence on the part of the prosecution that it was not. But I think the conduct of the parties shews that the inn was not full; because, if it had been, there could have been no use in the landlady asking the prosecutor his name, saying, that if he would tell it, she would ring for one of the servants. Verdict — Guilty.[3]

PARK, J., sentenced the defendant to pay a fine of 20*s*.

[3] In Lane *v.* Cotton (1701), 12 Mod. 472, HOLT, C. J., in speaking of those engaged in common callings, said: "Wherever any Subject takes upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects, he is *eo ipso* bound to serve the Subject in all the Things that are within the Reach and Comprehension of such an Office, under Pain of an Action against him; and for that see Kelway 50. If on the Road a Shoe fall off my Horse, and I come to a Smith to have one put on, and the Smith refuse to do it, an Action will lie against him, because he has made Profession of a Trade which is for the Publick Good, and has thereby exposed and vested an interest of himself in all the King's Subjects that will employ him in the Way of his Trade. If an Inn-keeper refuse to entertain a Guest, when his House is not full, an Action will lie against him; and so against a Carrier, if his Horses be not loaded, and he refuse to take a Packet proper to be sent by a Carrier; and I have known such Actions maintained, tho' the Cases are not reported. . . . If the Inn be full, or the Carrier's Horses loaded, the Action would not lie for such Refusal; but one that has made Profession of a public Employment, is bound to the utmost Extent of that Employment to serve the Publick."

Mr. Justice Holmes, in his work on The Common Law, p. 203, after quoting from Lane *v.* Cotton, *supra*, to the effect that "If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies," says: "An attempt to apply this doctrine at the present day would be thought monstrous. But it formed part of a consistent scheme for holding those who followed useful callings up to the mark. . . . The scheme has given way to more liberal notions; but the *disjecta membra* still move."

See a valuable article entitled Business Jurisprudence, by Edward A. Adler, in 28 Harvard Law Review, 135.

The survivors of the ancient common callings are the common carrier by land and water, and the innkeeper. See an article on The Origin of the Peculiar Duties of Public Service Companies, 11 Columbia Law Review, 514, 523 to 525. And see Hurley *v.* Eddington (1901), 156 Ind. 415.

In Gisbourne *v.* Hurst (1710), 1 Salk. 249, it was resolved "that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is as to this privelege a common carrier."

In Fay *v.* Pacific Improvement Co. (1892), 93 Cal. 253, the court said: "The fact that the house is open for the public, that those who patronise it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn, and a boarding-house."

PULLMAN PALACE CAR CO. *v.* LAWRENCE.

74 Miss. 782. 1897.[1]

WOODS, C. J. We now proceed to consider the law of the liability of the appellant in the present case. We need hardly say that the law of the state of Illinois is that to which we must look to ascertain whether a cause of action is shown, and to determine the extent and measure of the recovery sought, if appellee was entitled to recover at all. . . . It must be conceded, further, that the Pullman Palace Car Company is not technically a common carrier in the state of Illinois. Our constitution has wisely declared all sleeping car companies common carriers, but such is not the law in Illinois. In Illinois, as in many other states, sleeping car companies are regarded as nondescript corporations — *sui generis*. By these authorities they are said to be neither common carriers nor innkeepers. And yet they bear some marked resemblance to both. They are under the duty of not only furnishing seats in their cars to all proper persons applying therefor, but they are also under the obligation in all proper cases, and to the extent of their ability and capacity, to furnish sleeping accommodations and food to the travelling public, for proper compensation. They therefore seem to possess some of the characteristics of innkeepers. And they seem to be quasi common carriers. They own and use railway cars affording many comforts, conveniences and luxuries unknown to first-class ordinary cars of railroad companies, and these cars are to be used in the transportation of passengers from point to point, and the general travelling public is invited to become patrons of the company owning and using these luxurious coaches. The company is, in some sense, engaged in transportation, and its business is with the general public. It is unlike the private carrier, who may select his own customers, for it must take all who are proper persons, and who pay the demanded fare. So, though not technically a common carrier in Illinois, it bears marked resemblance to the common carrier, and must be held to the performance of its appropriate duties in its business intercourse with the travelling public.[2]

[1] Only an extract from the opinion is here reprinted.— ED.

[2] See also Nevin *v.* Pullman Palace Car Co. (1883), 106 Ill. 222; Pullman Palace Car Co. *v.* Booth (Tex., 1894), 28 S. W. 719; Searles *v.* Mann Boudoir Car Co. (1891), 45 Fed. 330; Lemon *v.* Pullman Palace Car Co. (1887), 52 Fed. 262. And see Interstate Commerce Act, § 1, APPENDIX, p. 482, as to Sleeping Car Companies.

STATE *v.* BELL TELEPHONE CO.

23 Fed. 539. 1885.[1]

THIS was an application on the part of the Baltimore & Ohio Telegraph Company to compel the defendant to give the petitioner telephone service. The defendant answered that it operated under a license obtained from the American Bell Telephone Company, by the terms of which defendant could only give service to telegraph companies with the consent of the licenser, and that the licenser permitted service to be given to the Western Union Telegraph Company, but would not allow service to be given to the petitioner.

BREWER, J. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the state of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here it is bound to deal equally with all citizens in every department of business.[2]

Section 2.

EXERCISE OF FRANCHISES.[1]

LUMBARD *v.* STEARNS.

4 Cush. 60. 1849.

THE facts of this case, which was a bill in equity for an injunction, are stated in the opinion of the court.

[1] The statement of facts is condensed, only part of the opinion of BREWER, J., is reprinted, and the dissenting opinion of TRENT, J., is omitted.— ED.

[2] In Commercial Union Tel. Co. *v.* New England T. & T. Co. (1889), 61 Vt. 241, a telephone company is spoken of as "a common carrier of speech for hire." See also State *v.* Nebraska Telephone Co. (Neb., 1885), 22 N. W. 237, and Bell Telephone Co. *v.* Commonwealth (Pa., 1886), 3 Atl. 825.

[1] "What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the

SHAW, C. J. This bill was originally brought by the plaintiff as an owner of mills on the lower part of Town brook, in Springfield, against the defendant Stearns, alleging that by means of an aqueduct, on his own land, he had diverted some portion of the water of two springs, being some of the sources of said brook, and thereby diminished the plaintiff's water power. Whilst this bill was pending and before answer filed, an act was passed by the legislature on the 10th of May, 1848 (*St.* 1848, *c.* 303), entitled "An act to incorporate the Springfield Aqueduct Company."

This act authorized the taking of the springs before mentioned of Stearns, by purchase, and with certain other springs, the laying of an aqueduct for the purpose, expressed in the act, of supplying the village of Springfield with pure water. The act contains the provisions usual in such acts, for forming a company and raising a capital; for taking springs and lands, paying all damages; for digging up roads and ways; providing hydrants; for a gratuitous supply of water, in case of fire; a penalty for corrupting the water; and vesting certain superintending powers in the board of health of Springfield, and the county commissioners of Hampden, respectively. After the passage of this act, a supplemental bill was filed, making the aqueduct company a party, and insisting on the same grounds against them, as stated in the original bill.

It is contended, that this act is unconstitutional and void, because it in effect authorizes the corporation to take private rights of property for a use which is not a public one, and, therefore, not within the authority of the legislature, even though provision is therein made for a compensation for any such damage.[1] It may be very

hands of a subject.' 2 Bl. Com. 37. Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. . . . No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise." California *v.* Pacific Railroad Co. (1888), 127 U. S. 1, 40.

[1] By force of the Fifth and Fourteenth Amendments to the Federal Constitution private property cannot be taken under the power of eminent domain except for public use. Missouri Pacific Ry. Co. *v.* Nebraska (1896), 164 U. S. 403; Madisonville Traction Co. *v.* St. Bernard Mining Co. (1905), 196 U. S. 239. We do not here take up exhaustively the question of what constitutes such public use as to justify the grant of the power of eminent domain. Such inquiry belongs properly in a course on Constitutional Law.— ED.

questionable, whether the plaintiff, taking the use of the brook for a mill power, does not take it subject to the reasonable use of all proprietors above, in or near whose premises it passes, for domestic purposes, for such ordinary trades as require the use of water, such as tanning, bleaching, dyeing, and the like, and also for the extinguishment of fires. If such be the right of the inhabitants to the use of the water, it may be a question, whether it is a greater encroachment on the plaintiff's rights, to take water by conduits and hydrants, than by buckets and engines. But as this right may involve a question of fact, which this case has not reached, in its present stage, we lay no stress on this consideration, but merely suggest it in passing.

But we can perceive no ground, on which to sustain the argument, that this act does not declare a public use. It is so expressed in its title, and in the first enacting clause, and the entire act is conformable to this view. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing a supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or nonfeasance, and the law has provided no other specific punishment for the breach, an indictment will lie. Perhaps also, in a suitable case, a process to revoke and annul the franchise might be maintained. But it is the less important to determine this question, because this charter is subject to the provision in the Rev. Sts. *c.* 44, § 23; by which it is competent for the legislature to make such alterations and amendments, as more effectually to carry into effect all the purposes of the act.

The court are of opinion that this act is not open to the objections made to it, and that it is not unconstitutional.

Bill dismissed.

OLMSTEAD *v.* PROPRIETORS OF THE MORRIS AQUEDUCT.

47 N. J. L. 311. 1885.[1]

THE questions involved in this case arose under an application made by the Proprietors of the Morris Aqueduct for the appointment of commissioners to condemn for their uses all the waters of a certain spring called Sandy Spring, and a certain specified portion of the waters of Mills Bailey Brook. The fourth reason assigned by the plaintiffs in error for asking that the appointment of commissioners be set aside was that the law under which the Proprietors had proceeded was not constitutional.

VAN SYCKEL, J. The presumption is always in favor of the validity of legislative acts. If no obligation rested upon the water company to supply on reasonable terms all who apply for water, the use would be strictly private. The duty of furnishing the public with water must be present, to make it of a public character.

Although the legislative act may contain no express provision imposing such duty, the presumption is that the legislature intended to act within constitutional limits by creating a public franchise, and that the grant to the company was for the purpose of providing for the public necessity and convenience.

The powers granted to the water company are unquestionably capable of being employed as a means of great public usefulness, and hence their creation was a legitimate act of legislation. An intention that they shall be used otherwise will not be imputed to the law-making power, nor will the grantee be permitted to pervert them to uses for which they could not lawfully be bestowed.

In accepting such a charter the company impliedly engages on its part to use it in such manner as will accomplish the object for which the legislature designed it. It cannot refuse to perform the public duties thus cast upon it, without surrendering the franchise. When an individual or a corporation is guilty of a breach of public duty by misfeasance or nonfeasance, the law provides a remedy.

The true criterion by which to judge of the character of the use is, whether the public may enjoy it of right, or by permission only. Bonaparte *v.* Camden and Amboy R. R. Co., Baldwin C. C. 205.

Assuming, as we must, that the legislature intended to exercise its lawful power, and that the company, in invoking the benefit of the corporating act, took upon it itself the correlative obligation

[1] The statement of facts is somewhat condensed, the arguments of counsel are omitted, and only part of the opinion is reprinted.— ED.

to serve the public, it necessarily follows that the use is a public one. I agree with Mr. Justice Parker, who delivered the opinion in the court below, that if the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head.

The supplement of 1880 to the act concerning telegraph companies contains no express words imposing the duty to send messages for all who apply. In Turnpike Company *v.* News Company, 14 Vroom 381, the Supreme Court maintained the constitutionality of the law as constituting a public use, on the ground that there must be an implication that in granting the franchise, the legislature intended to charge the companies with a duty to the public, and that in accepting the benefits of the law, the recipient of them assumes the performance of such public duty.

The case of Paterson Gas Light Company *v.* Brady, 3 Dutcher 245, is cited in support of the contrary contention. In that case Mr. Justice Elmer declared that the company was under no legal obligation to supply gas to all persons having buildings on the lines of their pipes, upon tender of reasonable compensation. He rested this view upon the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature in creating the company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and, of course, the grant of eminent domain for such private purposes would be void.

In this respect, in my judgment, the conclusion in the Paterson case was erroneous, and in conflict with the views expressed in the Tide-water case,[2] and in National Docks *v.* Central Railroad Company.[3]

In my opinion the judgment below should be affirmed.

HAUGEN *v.* ALBINA LIGHT & POWER CO.

21 Ore. 411. 1891.[1]

THIS is an action for a writ of mandamus to require the defendant

[2] Tidewater Co. *v.* Coster (1866), 3 C. E. Green 518.
[3] (1880) 5 Stew. Eq. 755.

[1] The statement of facts is condensed, and part of the opinion is omitted.— ED.

to supply the plaintiff with water by tapping a certain water main on Tillamook street, and allowing him to connect therewith a service-pipe.

The plaintiff is a resident of the city of Albina, and owns a lot on Tillamook street, on which he is constructing a residence. The defendant is a corporation supplying water to the inhabitants of the city of Albina and is operating under a franchise granted to said company by the council of the city of Albina by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Works Company, its successors and assigns, be and are hereby granted the right and privilege of laying pipes through the streets of Albina, for the purposes of conducting water through the city. Section 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for conducting the water shall be under the surface or level of the established grade eighteen or twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers; *provided,* that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city; *provided further,* that said water company shall in no case charge more than one dollar per month for the first faucet and fifty cents for each additional faucet in the same building, for family use or at a private dwelling house," etc. Under this ordinance the defendant company laid down a four inch pipe through Tillamook street, but refused to supply water from said pipe to plaintiff's residence though requested to do so, and though tendered by the plaintiff the regular fee for tapping a water main with a service pipe. A demurrer was sustained to the answer, and a judgment rendered making the writ peremptory, from which defendant appeals.

LORD, J. From this statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon, and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge therefor shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers, but that it contains no provision requiring it to supply the city or

its inhabitants with water, hence the ordinance imposes no duty upon the company to furnish water to any one.

In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city by its ordinance granted it the right to lay water-mains through its streets for the purposes of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed, without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitant of the city with water."

Counsel say: "If the ordinance had imposed upon the company the duty of supplying the inhabitants with water as a part of the conditions of the grant, such a conclusion might be supported; but where no such duty is imposed, and nothing is said except that when the company furnishes water, it shall charge no more than a certain rate per month, they fail to see the soundness of the reasoning which makes it the duty of the company to furnish water."

It is thus seen that it is the absence of any express provision in the ordinance, imposing the duty upon the defendant to supply water, upon which the argument and the case for the defendant is predicated. The effect to be given to the fact that the defendant company was incorporated under the law to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed by accepting the grant or franchise under the ordinance, is entirely overlooked. The defendant is treated as a private corporation, the business of which is private and not of a public nature, and to meet a public necessity, and as a consequence, that it should not be subjected to duties or obligations that are not binding upon other private corporations. In support of this view, the only authority cited and relied upon by the defendant is Paterson Gas Light Co. *v.* Brady, 27 N. J. L. 245; 72 Am. Dec. 360.

In that case the court was urged to assert the doctrine that gas companies, like common carriers and innkeepers, were bound to accommodate the public, but refused on the ground that the lack of precedents upon the subject could only be based upon the strong presumption that there was no principle of law upon which such a view could be supported. The court says: "The company may organize, may make and sell gas or not at their pleasure; and I see

no more reason to hold that the duty of doing so is meant to be imperative than to hold that other companies incorporated to carry on manufactories, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted on the argument that the community has a great interest in the use of gas, and that companies set up to furnish it ought to be treated like innkeepers and common carriers, and that if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported."

But this case and its reasoning was directly disapproved and overruled in the subsequent case of Olmstead *v.* Proprietors of Morris Aqueduct, 47 N. J. L. 333, in which the court says: "In that case,— Paterson Gas Light Co. *v.* Brady,— Mr. Justice ELMER declared that the company was under no legal obligation to supply gas to all persons having buildings on the line of their pipes, upon tender of reasonable compensation. He rested this view on the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature, in creating the company and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and of course the grant of eminent domain for such private purposes would be void. In this respect, in my judgment, the conclusion in the Paterson case was erroneous, and in conflict with the views expressed in Tide Water Co. *v.* Coster, 3 C. E. Green, 518; 90 Am. Dec. 634, and in Nat. Docks Ry. Co. *v.* Cent. R. Co. 5 Stew. Eq. 755."

This view is certainly more in accord with recent decisions establishing the doctrine that it is mandatory upon corporations of this sort to supply one and all without distinction. The defendant by incorporating, under the statute for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise, belonging to the public and not enjoyed of common right, for the accomplishment of public objects and the promotion of the public convenience and comfort. Its business was not of a private,

but of a public nature, and designed under the conditions of the grant as well for the benefit of the public as the company.

"Such a business," says Mr. Justice HARLAN, "is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale, but as the distribution of gas in thickly populated districts is, for the reason stated in other cases, a matter of which the public may assume control, services rendered in supplying it for public and private use, constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question." (Louisville Gas Co. *v.* Citizens Gas Co. 115 U. S. 683.) And, in another case, the same eminent judge said: "The manufacture of gas and its distribution for public and private use, by means of pipes laid down, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government to be granted for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision." (New Orleans Gas Co. *v.* Louisiana Light Co. 115 U. S. 650.)

It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It

was not organized to lay pipes but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as VAN SYCKEL, J., said, "is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head." (Olmstead *v.* Morris Aqueduct, *supra.*)

As the defendant could not carry on the business of supplying water without the franchise, the city must have intended, in granting such franchise, to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public without discrimination with the particular commodity which the corporation was organized to supply. "It may be laid down as a general rule," says Mr. Morawetz, "that whenever the aid of the government is granted to a private company, in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. . . . The same rule applies to companies invested with special privileges at the expense of the public for the purpose of supplying cities with water." (2 Morawetz on Corp. § 1129.)

The books are replete with illustrations of this principle as applied to water companies, gas companies, telephone companies, and others in the performance of public duties.[2]

[2] See also Griffin *v.* Goldsboro Water Co. (1898), 122 N. C. 206; McCrary *v.* Beaudry (1885), 67 Cal. 120; Rockingham County L. & P. Co. *v.* Hobbs (1904), 72 N. H. 531; Crumley *v.* Watauga Water Co. (1897), 99 Tenn. 420; American Water Works Co. *v.* State (1895), 46 Neb. 194; State *v.* Butte Water Co. (1896), 18 Mont. 199.

MINNESOTA CANAL & POWER CO. *v.* PRATT.

101 Min. 197. 1907.[1]

ELLIOT, J. In this proceeding the Minnesota Canal & Power Company seeks to condemn certain lands necessary for the construction of works designed and intended for the generation of electric power for distribution to the public for the purposes of light, heat, and power. The respondents moved to dismiss the petition on the ground that it did not state facts sufficient to constitute a cause of action. The motions were treated as in the nature of demurrers, and for the purposes of the hearing the allegations of the petition must be treated as true. The trial court granted the motions to dismiss, and the petitioner appealed from a judgment entered on the order of dismissal.

According to this petition the work of internal improvement which the petitioner now proposes to undertake involves the construction and maintenance of a continuous navigable watercourse from and within the territory hereinafter described and designated as the Birch lake drainage basin, in St. Louis and Lake counties, Minnesota, to a point . . . in West Duluth, which shall include

Irrigation cases: Price *v.* Riverside L. & I. Co. (1880), 56 Cal. 431; Sammons *v.* Kearney P. & I. Co. (1906), 77 Neb. 580.

"The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22) and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit reserved by the citizens is the adequate consideration for the right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all members of the public contributing to its asserted right, impartially. . . ." State ex rel. Wood *v.* Consumers' Gas Co. (1901), 157 Ind. 345, 351.

Other instructive cases on this subject of the duty of gas companies arising out of their exercise of the power of eminent domain, or the power to use streets and highways, are the following: Williams *v.* Mutual Gas Co. (1884), 52 Mich. 499; Portland Nat. Gas & Oil Co. *v.* State (1893), 135 Ind. 54; Coy *v.* Indianapolis Gas Co. (1897), 146 Ind. 655; Public Service Corporation *v.* American Lighting Co. (1904), 67 N. J. Eq. 122; Owensboro Gaslight Co. *v.* Hildebrand (Ky., 1897), 42 S. W. 351; Nairin *v.* Kentucky Heating Co. (Ky., 1900), 86 S. W. 676; Charleston Natural Gas Co. *v* Lowe (1901), 52 W. Va. 662, 671.

Electric light cases: Jones *v.* North Georgia El. Co. (1906), 125 Ga. 618; Cincinnati H. & D. R. R. Co. *v.* Village of Bowling Green (1879), 57 Oh. St. 366.

[1] The statement of facts, arguments of counsel, and parts of the opinion of ELLIOT, J., are omitted, as well as all of the dissenting opinion of LEWIS, J., concurred in by START, C. J. The dissent of START, C. J., and LEWIS, J., does not involve the points discussed in that part of the majority opinion here reprinted.— ED.

the construction and maintenance of a navigable canal connecting said Birch lake drainage basin with the Embarrass river, thence along said Embarrass river to a point in the northerly end of Sabin lake, . . . and the improvement of the Embarrass river and the lakes along the course thereof, and the St. Louis river below the outlet of the Embarrass river, down to [a designated point] in St. Louis county, Minnesota, the construction and maintenance of a navigable canal from said last-mentioned point on the St. Louis river easterly to said point in the city of Duluth, . . . and the construction and maintenance in connection therewith of a suitable device or chute for delivering logs, lumber, timber, forest and other products from the east end of said canal at the point last described to and into the said bay of St. Louis, which canal shall be of such size, dimensions, and capacity as to allow the floating of canal boats and barges and other water craft thereon for the transportation of merchandise, and to allow the floating of logs, lumber, timber and forest products thereon, which watercourse shall be capable of delivering the logs, lumber, timber, forest, and other products from said Birch lake drainage basin and from said St. Louis river and its tributaries to and into the bay of St. Louis at the said city of Duluth and the water tributary to the St. Louis river canal hereinafter described.

This work involves and will require the diversion into said watercourse of such portions of the waters of the said Birch lake drainage basin as may be required to carry out the purposes of this corporation, and the diversion of which will not interfere with the navigation, navigable capacity, or public use of the waters of the said Birch lake drainage basin and the various lakes and streams to which they are tributary and the diversion into said St. Louis river canal of the waters tributary thereto.

The object and purpose of the enterprise is described as the furnishing and distribution, by means of such watercourse and said work, of water to municipalities, persons, and corporations for public use; the generation of electricity by means of the water power hereinafter described, and the supplying of such electricity for public use to all municipalities, persons, and corporations desiring the same for light, heat, and power purposes, which water power shall be created by conducting in pipes and conduits the waters so diverted from the east end of said St. Louis river canal to the power plant of your petitioner, which will be located at or near the level of the bay of St. Louis, at said city of Duluth, under a head of six hundred feet or thereabouts.

1. The petitioner is met at the threshold with the assertion that it is not a public service corporation, and cannot, therefore, under

any circumstances at present exercise the power of eminent domain. This contention seems to be the result of an inversion of ideas. It would be more nearly correct to say that the appellant is a public service corporation, because it has been granted the power of eminent domain in aid of the purposes for which it was incorporated. The power of eminent domain is not given to public service corporations eo nomine. Certain corporations organized to serve the public are given the right to exercise this sovereign power as the agent of the state. What have become known as "public service corporations" are organized and exist under the authority of the state to serve the public, by supplying the people on equal terms and for a reasonable compensation with services or commodities and articles which, because of their nature, location, or manner of production and distribution, can be best produced and distributed by some organized form of enterprise operating under state control.

The statutes do not define public service corporations, although the Revised Laws of 1905 carry the name as the heading of section 2841, which authorizes the organization of corporations for the specific purposes therein enumerated. The power of eminent domain is specifically granted to the corporations which may be organized under this section of the statute, and in that statute the state reserves a power of control which it would unquestionably have by the common law, because of the nature of the business in which such corporations are authorized to engage. That business is such that the property of all corporations organized thereunder becomes affected with a public use, and is therefore subject to public regulation and control. The corporations which may be authorized under section 2841, R. L. 1905, are such as fall within the ordinary conception of a public service corporation. The "business" of such a corporation is determined by its charter statement of purposes, which must be within the scope and limits of the statutory authorization. Every such corporation is by the same statute (R. L. 1905, § 2842) expressly authorized to condemn "such private property as may be necessary or convenient for the transaction of the public business for which it was formed." This "public business" includes the construction of works for supplying the public, by whatever means, with water, light, heat, and power. In this connection the state expressly reserves the right at all times "to supervise and regulate the business methods and management of any such corporation and from time to time to fix the compensation which it may charge or receive for its services." In addition thereto it is provided that "every such corporation obtaining a franchise from a city or village shall be subject to such

restrictions and conditions as from time to time may be imposed upon it by such municipality."

The appellant was organized under these statutes, and the nature of its business, as stated in its articles of incorporation, is "to generate electricity in the state of Minnesota by steam or water power for public use, and to distribute and supply such electricity to the public for light, heat and power purposes." The generation of electrical power for distribution and sale to the general public on equal terms is a public enterprise, and property used for such purpose is devoted to a public use. Minnesota Canal & Power Co. *v.* Koochiching Co., 97 Minn. 429, 107 N. W. 405. The articles recite that this is to be done for the public on equal terms and for a reasonable compensation, subject, as required by the statute, to the supervision and control of the state of Minnesota. The petition in this proceeding alleges that for the purpose of accomplishing the purpose for which the corporation was organized it has undertaken the work of internal improvement therein described in detail, and that "all of said works are to be constructed and maintained for public use on equal terms by all municipalities, persons and corporations for a reasonable compensation subject to the state of Minnesota."

The incorporation of the appellant is for a specific purpose, and the law of its corporate being requires it to exercise its powers subject to the supervision and control of the state. It must serve the public on equal terms and for a reasonable compensation. By accepting the franchise it has consented to exercise its powers, subject to this supervision and control, in the interest of the public. Stewart *v.* Great Northern Ry. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; Charleston *v.* Lowe, 52 W. Va., 662, 671, 44 S. E. 410; Olmstead *v.* Proprietors, 47 N. J. L. 311; Haugen *v.* Albina, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; Cincinnati *v.* Village, 57 Oh. St. 336, 345, 49 N. E. 121, 41 L. R. A. 422; American *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. 610; Crumley *v.* Watauga, 99 Tenn. 420, 41 S. W. 1058; Griffin *v.* Goldsboro, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Rockingham Co. *v.* Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581. In granting this charter the state reserved the right to regulate the business of the corporation. By accepting the franchise the corporation engaged to use it in such a manner as will accomplish the objects for which the legislature granted the charter.

ALLNUTT *v.* INGLIS

12 East, 527. 1810.[1]

THE plaintiffs' declaration stated in part that they imported into the port of London 40 pipes of wine, being goods which might by the statute be secured in defendant's warehouse without the duties due being first paid, and did all things necessary to legalize the lodging of said goods in defendant's warehouse, and demanded that the defendant receive them *for reasonable hire and reward,* and tendered the goods to the defendant, and were at all times ready and willing to pay such reasonable hire and reward, but that defendant refused to receive such goods into said warehouse, though there was sufficient vacant room for such goods, whereby the plaintiffs were injured by being required to advance the duties on such goods to the amount of £500.

The plea of the defendant was to the effect that a table of charges for warehousing had been published, and that the plaintiffs refused to pay the amount set forth in such table, which was the reason for the refusal to accept the plaintiffs' goods. To this plea there was a general demurrer.

Richardson for the plaintiff. The reasonableness of the hire and reward offered by the plaintiffs to the company for the privilege of warehousing their goods in its warehouses, without the immediate payment of the import duties, is admitted: and the question is whether the company were bound to receive the goods upon those terms. It is a general rule of law, that where a person has monopoly granted to him for public purposes, he is bound to render the service or use of the thing to which his privilege is annexed for a reasonable compensation. . . . Then under the warehousing act, the intent of the legislature was not merely to confer a benefit upon the London dock company, but to make them the instruments of a public benefit to the trade of London: and the company having accepted the monopoly *cum onere,* and knowing such to have been the intent of the legislature, they cannot now convert it into an engine to extort unreasonable rates. . . . If then the company did not mean to dedicate their warehouses to the public use in this manner, they ought to have made their stand in the first instance, and should have declined taking the certificate of the lords of the treasury, conferring the exclusive privilege, which issued with their own consent. And if this were otherwise, and the company could

[1] Only the substance of the pleadings is here given, and parts of the arguments of counsel are omitted.— ED.

refuse to receive the goods of the merchants except upon their own terms, the act would be for the benefit of the company, and not of trade in general, which it would rather encumber.

Bosanquet, contra. Every person is entitled to make the best use of his own property, and the only exception to the rule is in cases where the owner has so entirely dedicated the use of it to the public, that he cannot resume the exclusive possession of it again; as in the instance of a highway, or ferry. So if one accept a grant from the crown of land on the sea shore or on the bank of a navigable river, in a public port, for the purpose of erecting a public wharf or quay, he cannot disuse it, but is bound to preserve it for its destined purpose. If a man open a public house, he cannot refuse to entertain travellers; if he set up as a public carrier he cannot refuse to carry: but he may limit his engagement with the public, and then he is not bound to admit travellers in the one case, or to carry goods in the other, upon any other terms than those upon which he engaged. [Ld. *Ellenborough,* C. J. It must be recollected that in those cases there is a power in the public of increasing the number of public houses or of carriers indefinitely.] The London Assurance Company, it is well known, contract at a premium rather higher than the ordinary rate of insurance. If this company had built counting houses instead of warehouses, might they not have let them for as much as they could get? [Lord *Ellenborough,* C. J. The business of insurance and of counting houses may be carried on elsewhere, and therefore such instances do not apply. The only question arises on the bonding act: shew us that wines may be bonded elsewhere.] There are in fact now other warehouses licensed for bonding wines besides those within the docks. [Lord *Ellenborough,* C. J. asked whether the London dock company were not themselves the occupiers of those other warehouses?] And it was admitted that they were: but it was insisted that as the crown is not restrained from licensing other warehouses, it cannot be considered as a monopoly in the company, so as to make the rule of law attach upon them. [Lord *Ellenborough,* C. J. If the privilege should be extended to other warehouses, it will only be a more extended monopoly in the company and in the owners of the other privileged places.]

Richardson in reply was desired by the Court to consider how far the company was pledged to continue to apply its warehouses to this purpose; and also how far the crown was restrained from licensing other warehouses in other hands in the port of *London* for the same purpose. He denied that the company, having accepted of this privilege to their warehouses for the benefit of the public as well as of themselves, could throw them up at their own

pleasure, without reasonable notice to the crown; for if so, the public might be deserted just at the moment of need, and after the merchants have committed themselves and incurred expence and risk upon the faith of the engagement between the crown and the company. It must be understood that when the company accepted the certificate conferring the exclusive privilege, they took it with all its burthens, and cannot withdraw from it: and while their term is running, the legislature declares that it shall be lawful for the importers, &c. of goods to warehouse them in the company's warehouses, without payment of the duties at the time, provided they are certified by the treasury; which has been done. But at any rate, supposing the company could withdraw their warehouses from this use, with or without notice, it is sufficient in this case that they have not done so; and while they in fact enjoy the monopoly, they must take it cum onere. Then supposing other outlying warehouses have been licensed, the argument is not varied against the company under whose control they are. And supposing others were also licensed, that would not destroy but only extend the monopoly.

LORD ELLENBOROUGH, C. J. The question on this record is whether the *London* Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. The question then is, whether circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of *London,* whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord *Hale,* obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord *Hale* puts the case either way; where the king or a subject have a public wharf to which all persons must come

who come to that port to unlade their goods, either "because they "are the wharfs *only licensed* by the queen, or because there is "*no other wharf* in that port, *as it may fall out:* in that case, (he "says) there cannot be taken arbitrary and excessive duties for "cranage, wharfage, &c.: neither can they be enhanced to an immo- "derate rate; but the duties must be reasonable and moderate, "though settled by the king's license or charter." And then he assigns this reason, "for now the wharf and crane and other con- "veniences are affected with a public interest, and they cease to be "juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company but for the good of trade. The first clause[2] says that it would greatly tend to the *encouragement of the trade and commerce of* G. B., *and to the accommodation of merchants and others* if certain goods were permitted to be entered and landed and secured in the port of *London* without payment of duties at the time of the first entry: and then it says that *it shall be lawful* for the importer of certain goods enumerated in table A. to secure the same in the *West India* dock warehouses: and then by *s. 2.* other goods enumerated in table B. may in like manner be secured in the *London* dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the *London* dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it adviseable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction: and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid

[2] 43 G. 3, c. 132, the general warehousing act.

down by Lord *Hale* in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.

GROSE, J. The company contend that they may take what warehouse rent they please: but if they have a monopoly of the warehousing for this purpose, we cannot say that the legislature intended that they should take any price they chose to impose upon the importer; for if they could, it would violate the general intention of the act which was to promote and assist trade, and not to prejudice it, which the company would be enabled to do if they could enhance their demand for warehouse rent to any extent they pleased. And if we attend to the principle of law by which monopolies are regulated, and apply to this case what is laid down by Lord *Hale* upon that subject, it is impossible to say that this company do not come within that principle.

LE BLANC J. We can only look to the situation of the parties as they appear upon this record, and with reference to the acts of parliament. The company are proprietors of warehouses in the port of *London,* which they were not under any obligation to erect by the original act constituting them a company: they stood therefore before the passing of the general warehousing act in the same situation as other proprietors of warehouses. Then the warehousing act was passed, which is expressed to be for the encouragement of trade and the accommodation of the merchants and others: and by the 2d section it is made lawful for the importer to secure these goods in the *London* dock warehouses without paying the duties upon entry; and it does not appear at present that that privilege is extended either by act of parliament or by any other competent authority to any other than the warehouses belonging to the company. Then admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance; yet having, as they now have, this monopoly, the question is whether the warehouses be not private property clothed with a public right; and if so, the principle of law attaches upon them. The privileges then of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but only a reasonable rent? But upon this

record the company resist having their demand for warehouse rent confined within any limit; and though it does not follow that the rent in fact fixed by them is unreasonable, they do not chuse to insist on its being reasonable, for the purpose of raising the question. For this purpose therefore the question may be taken to be, whether they may claim an unreasonable rent? But though this be private property, yet the principle laid down by Lord *Hale* attaches upon it, that where private property is affected with a public interest, it ceases to be juris privati only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. That principle was followed up in the case of Bolt *v.* Stennett: for there the quay being one of the public quays licensed under the statute of *Elizabeth,* it was held that the owner was bound to permit the use of the crane upon it, and could not insist either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the use of it upon reasonable terms. Whether the company be bound to continue the use of their warehouses for this purpose may hereafter be material to be decided, but no question arises upon that at present: the warehouses are still applied to the purpose, and there was room sufficient to have received these goods at the time; and the only question was whether they were bound to receive them for a reasonable rent: this they refused to do, and in that refusal they were wrong.

BAYLEY J. The question is whether the company have a right to impose their own terms, whether reasonable or not, upon the importers of these goods who offered to deposit them in their warehouses upon the terms of the warehousing act? For if so, they might exclude particular individuals from the benefit of the act. Or the question may be stated to be whether the public have not a right under that act to deposit and secure certain goods in the company's warehouses upon reasonable terms, and whether the company be not bound to receive such goods from all the public? Now the act is declared to be passed for the benefit of the trade in general and for the accommodation of the merchants: and it proceeds afterwards to say that it shall be lawful for the importers, &c. (meaning all importers, and not particular individuals of them) to secure their goods of a certain description in the company's warehouses. But according to the argument now urged for the company, the act was not passed for the benefit of *all* importers, but of such only as chuse to pay the company what they are pleased to demand for warehouse rent; for to this length the argument necessarily goes. It is said however that the company have not a monopoly of this privilege; but I am not aware of any act of parliament

which gave the commissioners of the treasury any power to license particular places for the bonding of *wines* before this act; though I know they had such a power with respect to sugar and coffee. But whether they had it or not, it is sufficient to say that these were the only warehouses where the importer had a right to insist that his goods should be warehoused and bonded; for he certainly could not have obliged the commissioners to license any other place for that purpose. As to the question whether the company may renounce the application of their warehouses to this use, I cannot add to what the Court have already said: but at least they cannot renounce it partially; and I think it would be deluding the public if the company were able to renounce at a moment's warning the warehousing of the goods for this purpose after they had agreed to accept the licence and monopoly.

Judgment for the plaintiff.[3]

[3] See the interpretation and application of this case in Attorney-General *v.* Simpson [1901], 2 Ch. 671, 719, and in Simpson *v.* Attorney-General [1904], A. C. 476, 483.

"In this case the charter conferred the privilege of driving, not a part, not such portion as the company may choose, but 'all' the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. . . . By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all*, or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do." Weymouth *v.* Penobscot Log Driving Co. (1880), 71 Me. 29, 39.

See also Gordon *v.* Winchester (Ky., 1826), 12 Bush, 110; New Orleans Gas Light Co. *v.* Paulding (La., 1845), 12 Rob. 378, 380; Shepard *v.* Milwaukee Gas Light Co. (1858), 6 Wis. 526, 534; Patterson *v.* Wollman (1896), 5 N. D. 608, 615.

AIDING PRIVATE ENTERPRISES THROUGH TAXATION.

"The power of government . . . to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use." Lowell *v.* Boston (1873), 111 Mass. 454, 462.

"But railroads are always held to be built for public use, whether the right to take land, or the right to grant pecuniary aid to them, is considered. . . . The building of the subway for the carriage of such passengers as pay the regular fare is therefore for a public use; and it is within the constitutional power of the Legislature to order or sanction taxation for it." Price *v.* Crocker (1896), 166 Mass. 347, 361.

Section 3.

LEGISLATION.

MUNN *v.* ILLINOIS

94 U. S. 113. 1876.[1]

THE Constitution of Illinois, adopted in 1870, contains the following in reference to the inspection of grain, and the storage thereof in public warehouses:

ARTICLE XIII.— WAREHOUSES.

"Section 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

"Section 7. The general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce."

An act of the general assembly of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State," approved April 25, 1871, provides in the second paragraph of section 15, as follows:

"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one cent per bushel."

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed

[1] The statement of facts has been abridged, parts of MR. CHIEF JUSTICE WAITE'S opinion are omitted, and only one paragraph of MR. JUSTICE FIELD'S quite lengthy dissenting opinion is reprinted.— ED.

together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the

people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases,* 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen,

and draymen, and the rates of commission of auctioners," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.[2]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at

[2] Quotations from Lord Hale's De Jure Maris with regard to ferries, and from the same author's De Portibus Maris with regard to public wharves, and from the opinions in Allnutt *v.* Inglis, *supra*, are omitted.— Ed.

least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile *v.* Yuille, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And, in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. *v.* Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north

of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing

of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these planitiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made

would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.[3]

Judgment affirmed.[4]

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE FIELD. It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment

[3] The rest of this opinion is devoted to defendant's contention that the statute in question is repugnant to section 8, article 1, and to section 9 of the Constitution of the United States. These contentions were held not to be valid.— ED.

[4] MR. JUSTICE BRADLEY, who concurred with the CHIEF JUSTICE, said later of Munn *v.* Illinois: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizens; in other words, when it becomes a practical monopoly, to which the citizen

of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by

is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." Sinking Fund Cases (1878), 99 U. S. 700, 745.

means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the State, in exercising its power of prescribing the compensation only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases.

MR. JUSTICE STRONG. When the judgment in this case was announced by direction of a majority of the court, it was well known by all my brethren that I did not concur in it. It had been my intention to prepare a dissenting opinion, but I found no time for the preparation, and I was reluctant to dissent in such a case without stating my reasons. MR. JUSTICE FIELD has now stated them as fully as I can, and I concur in what he has said.[5]

PEOPLE *v.* BUDD.

117 N. Y. 1. 1889.[1]

ANDREWS, J. The main question upon this record is, whether the legislation fixing the maximum charge for elevating grain, contained in the act, chapter 581 of the Laws of 1888, is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state, at five-eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, "lake vessels or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by a fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than one hundred and thirty thousand population. The defendant, the manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company for elevating, raising and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and

[5] Two judges also dissented when this case was before the Supreme Court of Illinois. Munn *v.* People (1873), 69 Ill. 80.

[1] The arguments of counsel, and parts of the opinion of ANDREWS, J., are omitted, as well as the dissenting opinions of GRAY and PECKHAM, JJ.

for shoveling to the leg of the elevator, the carrier was charged and compelled to pay four dollars for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator one dollar and seventy-five cents a thousand bushels, for the use of the steam shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services and the expense of the steam-shovel charge the carrier for each thousand bushels of grain shoveled the sum of four dollars. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count charging a violation of the first section in two particulars, viz.: In exacting more than the legal rate for elevating the cargo, and exacting more than the actual cost for shovelling the grain to the leg of the elevator. Before reaching the main question there is a subordinate question to be considered.

. . . . . .

Passing this point, we come to the main question, whether legislative power under the State Constitution exists in the legislature to prescribe a maximum charge for elevating grain by stationary elevators owned by individuals or corporations, who have appropriated their property to this use and are engaged in this business. The ascertainment of the exact boundaries of legislative power under the rigid constitutional system of the American states is in many cases attended with great perplexity and difficulty. The People have placed in the Constitution a variety of restrictions on legislative power, and chief among them is that which ordains that no person shall be deprived of life, liberty or property without due process of law. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all. This power of government, the power as expressed by TANEY, C. J. (5 How. 583), "inherent in every sovereignty, the power to govern men and things," is not, however, an uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body. But within its legitimate domain the power is original, absolute and indefeasible. It vested in the legislative department of the government at its creation, without affirmative grant or definition, as an essential political power and attribute of government, and personal rights and rights of property are sub-

ordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws. It was designed for the protection of personal and private rights against incroachments by the legislative body not sanctioned by the principles of civil liberty as held and understood when the Constitution was adopted. The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British parliament is not the test of legislative power under the written Constitution of the American States. But the great landmarks of civil liberty, embodied in our State Constitutions, were established by our English ancestors, and upon questions such as the one now before us we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation and legal adjudications are pertinent and important considerations and elements in the determination of the controversy.

The act in question regulates the price of elevating grain, and the regulation affects the compensation which may be lawfully demanded for labor and personal services, as well as for the use of property. It fixes a maximum charge for labor and the use of property when combined, as they of necessity are, in the business of elevating grain. The operation of the statute is by its terms limited to the business carried on in cities and towns having a population of not less than one hundred and thirty thousand, practically to the cities of Buffalo, New York and Brooklyn. The circumstances, also, substantially restrict the application of the act to grain brought to Buffalo from the upper lakes by water, and there, by means of elevators, transshipped into canal boats and transported through the Erie canal and Hudson river to the harbor of New York and there discharged by elevators into warehouses or ocean vessels. The business of transporting grain by the lakes, and thence by the Erie canal to New York, is one of great magnitude. The case shows that about one hundred and twenty millions of bushels of grain annually come to Buffalo from the west.

The business of elevating grain at that point is mainly connected with lake and canal transportation. It is shown by official records that the receipts of grain at New York in the year 1887, by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded forty-six million bushels, an amount very largely in excess of the amount received during the same period by rail and by river and coastwise vessels. The elevation of this grain from lake vessels to canal boats takes place at Buffalo, where the case shows there are thirty or forty elevators, stationary and floating. How many of these elevators are actually employed in the business does not appear. The record is silent as to many facts which might tend to explain the relation of this business as actually conducted, to the public interests. It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges, by fixing a uniform tariff and pooling the earnings, and dividing them ratably among all of the elevator owners, although but a part of the elevators are actually operated. (See report of the committee on foreign commerce of the Chamber of Commerce of New York, made in April, 1885.) There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both lake vessels and canal boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available for the erection of stationary elevators.

In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to

pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty.

The justification of the statute of Illinois regulating the charge for elevating and storing grain in the elevators of that state was placed in the Munn Case upon that principle of the common law stated by Lord HALE in his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), that when private property is "affected by a public interest it ceases to be *juris privati* only." The principle of the decision is stated with great perspicuity by BRADLEY, J., in his opinion in the Sinking Fund Cases (*supra*). He says: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." The elevators in Chicago had no legal monopoly in the business of elevating grain. The business was open to all comers, but the location of the elevators, their connection with the railroads, on which most of the grain from the grain-producing states and territories of the west and northwest was brought to Chicago, the necessity of using them in the transfer, storing and transhipment of grain, created, as was held by the court, a virtual and practical monopoly which affected the business and property with a public interest and subjected them to regulation by law. The application of the language of Lord HALE and of the principle that private property may, by its uses, cease to be *juris privati* strictly, and become affected by a public interest, to the business of elevating grain in Chicago, was combated and denied by FIELD, J., in his very able and forcible dissenting opinion. "It is," he declared, "only where some privilege in the bestowment of the government is enjoyed in connection with (private) property, that it is affected by a public interest in any proper sense of the terms. It is the public privilege connected with the use of the property which creates the public interest in it." There can be no doubt that where the government confers a special privilege upon a citizen, not of common right, it may annex such conditions upon its enjoyment as it sees fit. Nor can there be any question that where an individual has a legal monopoly to use his property for a public purpose, and the public have an interest in the use, he is subject to an obligation cast upon him by the common law to

demand only a reasonable compensation for the use. This is stated with great clearness by Lord ELLENBOROUGH in Allnutt *v.* Inglis (12 East 527). "There is," he said, "no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms." But the question is whether the power of the legislature to regulate charges for the use of property and the rendition of services connected with it, depends in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business.

It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which, by legislation, would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty — liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by

the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation.

The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits, is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transporting cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges and to bring into the combination any new elevator which may be erected and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination, in fact, exists, the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists, the court has nothing to

do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said CHASE, Ch. J., in the License Tax Cases (5 Wall. 469), "can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord HALE, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen and interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases.

The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation. *The judgment should be affirmed.*[2]

[2] This decision was affirmed by the Supreme Court of the United States. Budd *v.* New York (1891), 143 U. S. 517. MR. JUSTICE BLATCHFORD, in delivering the opinion of the court, said at the outset that "the main question involved in this case is whether this court will adhere to its decision in Munn *v.* Illinois." After reviewing the opinion of ANDREWS, J., in People *v.* Budd, he said: "We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just." MR. JUSTICE BLATCHFORD concluded by reviewing the opinion of MR. CHIEF JUSTICE WAITE in Munn *v.* Illinois, and the cases in which that opinion had been followed or approved.— ED.

MR. JUSTICE BREWER wrote the following dissenting opinion, which was concurred in by MR. JUSTICE FIELD and MR. JUSTICE BROWN:

"I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of Munn *v.* Illinois, 94 U. S. 113, reaffirmed. That is, as declared in the syllabus and stated in the opinion in that case: 'When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent, of the interest he has thus created.' The elaborate discussions of the question in the dissenting opinions in that case, and the present cases when

under consideration in the Court of Appeals of the State of New York, seem to forbid anything more than a general declaration of dissent. The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the State. The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is *pro tanto* doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

"Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, 'life, liberty and the pursuit of happiness'; and to 'secure,' not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation.

"It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where any one by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

BRASS *v.* NORTH DAKOTA.

153 U. S. 391. 1894.[1]

MR. JUSTICE SHIRAS delivered the opinion of the court.

The legislature of the State of North Dakota, by an act approved March 7, 1891, c. 126, Laws of 1891, p. 321, and entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the fourth section thereof, that "all buildings, elevators, or warehouses in this State, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this State, as above described, whether said owners or operators reside within this State or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the fifth section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this State shall

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream."

. . . . . .

"But, as I said, I do not care to enter into any extended discussion of the matter. I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use.

"MR. JUSTICE FIELD and MR. JUSTICE BROWN concur with me in this dissent."

[1] The statement of facts, as given in the report, is not here reprinted, and parts of the opinions of MR. JUSTICE SHIRAS and MR. JUSTICE BREWER are omitted.— ED.

file with the railroad commissioners of the State a bond to the State of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than $5000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the State in relation thereto;" and in the eleventh section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner;" and by the twelfth section it is provided that "any person, firm, or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the District Court of the Second Judicial District of the State of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts,[2]

[2] Brass owned and operated a grain elevator in the village of Grand Harbor, North Dakota, and Stoeser owned a farm adjoining the village, on which in the year 1891 he raised about 4,000 bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat-crop for the compensation fixed by the statute, which Brass refused to accept for storage unless paid therefor at a rate in excess of that fixed by the statute. Upon this refusal Stoesser filed in the District Court of Ramsay County, North Dakota, a petition for an alternative writ of mandamus. This was granted. To this writ Brass made return by answer, admitting the truth of the facts pleaded, but setting forth that in North Dakota there are about six hundred grain elevators operated by about one hundred and twenty-five independent owners; that there are from two to ten such elevators at every station in the State from which grain is shipped, and that property suitable for such elevators is unlimited and easily procurable; that at Grand Harbor there are three grain elevators independently owned and operated; that defendant's elevator is small, having a capacity of about 30,000 bushels; that defendant's main business is that of buying and selling grain, to which storing is a mere incident; that in some seasons there is space in defendant's elevator in excess of that used for defendant's grain, but that at other times defendant's elevator is not large enough to hold all of his own grain; that to compel defendant to store grain for all applicants would ruin his own business; that defendant refused to comply with the statute of North Dakota because it deprived him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the States. To this return Stoeser interposed a general demurrer, which was sustained, and Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the Supreme Court of North Dakota, which court affirmed the order and judgment of the District Court.— ED.

the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the Supreme Court of the State. Brass *v.* North Dakota, 52 N. W. Rep. 408.

In the cases thus brought to this court from the States of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those States, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States, and to the Fourteenth Amendment, which ordains that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire State.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire State, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combina-

tions to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in transshipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural State, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length, into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their

validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the write of mandamus, based his defence wholly upon grounds arising under the constitution of the State and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce be-

tween the States. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly *Affirmed.*

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE, dissenting.

I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on Munn *v.* Illinois, 94 U. S. 113, and Budd *v.* New York, 143 U. S. 517. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in Sinking Fund Cases, 99 U. S. 700, 747, and in Wabash, St. Louis & Pacific Railway *v.* Illinois, 118 U. S. 557, 569, Mr. Justice Bradley and Mr. Justice Miller, who concurred in the judgment in Munn *v.* Illinois, each sought to limit and qualify the scope of the language used by the Chief Justice in that case. These are the words of Mr. Justice Bradley:

"The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of Mr. Justice Miller, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

It appears from these admissions that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full and there was room for the storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for

the storage of grain of others, yet such use was a mere incident to and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus to a limited extent engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed for that transaction engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered irrespective of the injury which it does to his own business. And it is admitted that, at the time of this tender, there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business. And this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not prove that to-morrow he may not need the entire capacity of his elevator. And yet, if, because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to-morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant. And if once deposited the owner cannot be compelled to remove it, merely for the accommodation of the warehouseman, but may leave it there

indefinitely so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree of the court was that the "writ issue as prayed for," and that is the decision which is affirmed by this court.

I dissent in the second place because the facts show, in the words of Mr. Justice Bradley, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road within the limits of this State there are about six hundred of these elevators, owned and operated by over one hundred and twenty-five different persons, varying in cost of construction from $500 to $5000; at every station there is land purchasable by any one at prices varying from $1.25 to $40 per acre, and a granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding $150. So it is that when any farmer or other individual can at a cost of less than $200 provide himself with all the facilities for storing and shipping the entire product of an ordinary farm, when along the line of a single railroad there are six hundred elevators already constructed, owned, and operated by one hundred and twenty-five different persons, when at every station at which grain is marketed there are from two to ten such elevators, it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease and freedom of business commence. For obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.

I dissent in the third place because by this law the elevator man is bound not merely to receive, store, and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury, and even destruction of his own special business of buying and selling grain, to receive and store grain for whoever may demand it in an elevator which he is maintaining and operating for the exclusive carrying on of his own business at any price which it sees fit to allow, and at the same time compel him to advance the money to insure the

property thus forced upon him, I can only say that it seems to me that the country is rapidly travelling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE concur in this dissent.[3]

GERMAN ALLIANCE INSURANCE CO. *v.* LEWIS.

233 U. S. 389. 1914.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property — business of common carriers — is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The

[3] Statutory regulation of stockyard charges has been held to be constitutional. Ratcliff *v.* Wichita Union Stockyard Co. (1906), 74 Kan. 1, where the Court said in part: "The operation of stockyards has more of the characteristics of a public business than the carrying on of an elevator or a warehouse. It possesses the market features, including considerations of sanitation and health, and it also has more of the monopolistic features. . . . The company has . . . a practical monopoly of a vast business, affecting thousands of people who are almost obliged to deal at that market and at the rates which the company may choose to charge." See also the opinion of MR. JUSTICE BREWER in Cotting *v.* Kansas City Stockyards and the State of Kansas (1901), 183 U. S. 79.

Statutory regulation of the charges of tobacco warehouses has also been held to be constitutional. Connell *v.* Louisville Tobacco Warehouse Co. (1902), 113 Ky. 630.

[1] The statement of facts, and parts of MR. JUSTICE MCKENNA'S opinion are omitted.— ED.

basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (Noble State Bank *v.* Haskell, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn *v.* Illinois, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this

new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

Munn *v.* Illinois was approved in many state decisions, but it was brought to the review of this court in Budd *v.* New York, 143 U. S. 517, and its doctrine, after elaborate consideration, re-affirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In Brass *v.* Stoeser, 153 U. S. 391, Munn *v.* Illinois and Budd *v.* New York were affirmed. A law of the State of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it — that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402), "that the statutes of Illinois and New York [passed on in the Munn and Budd Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of

carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural State where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (p. 404).

The restriction upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times — certainly the sense of the modern world — is of the greatest public concern. It is, therefore, within the principle we have announced.

But it is said that the reasoning of the opinion has the broad

reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or — to confine ourselves to that which is under review — whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not

judicial. Our function is only to determine the existence of power.[2]

THE PIPE LINE CASES.

234 U. S. 548. 1913.[1]

SIX appeals from the United States Commerce Court to review decrees enjoining the enforcement of an order of the Interstate Commerce Commission requiring parties in control of oil pipe lines to file with the Commission schedules of rates and charges for transportation.

MR. JUSTICE HOLMES delivered the opinion of the court.

By the act of Congress of June 29, 1906, chap. 3591, 34 Stat. at L. 584, the Act to Regulate Commerce was amended so that the 1st section reads in part as follows: "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Thereafter the Interstate Commerce Commission issued an order requiring the appellees, among others, being parties in control of pipe lines, to file with the Commission schedules of their rates and charges for the transportation of oil. 24 Inters. Com. Rep. 1. The appellees thereupon brought suit in the Commerce Court to set

[2] MR. JUSTICE LAMAR wrote a dissenting opinion, concurred in by MR. CHIEF JUSTICE WHITE and MR. JUSTICE VAN DEVANTER. The points particularly emphasized in the dissenting opinion are contained in the following sentences:

"The fact that insurance is a strictly private and personal contract of indemnity puts it on the extreme outside limit, and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated — if the price of a chose in action can be fixed — then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated, and the reasoning upon which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning, and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute."

"Not only does the Munn Case show that the right to fix prices depends upon the concurrence of public interest and the employment of property devoted to a public use, but, with the exception of the Louisiana Bread Case, Guillote *v.* New Orleans, 12 La. Ann. 432, it is believed that every American rate statute, since the requirement that property should not be taken without due process of law, related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use."

[1] The concurring opinion of MR. CHIEF JUSTICE WHITE, and the dissenting opinion of MR. JUSTICE MCKENNA are omitted.— ED.

aside and annul the order, and a preliminary injunction was issued by that court, on the broad ground that the statute applies to every pipe line that crosses a state boundary, and that thus construed it is unconstitutional. 204 Fed. 798. The United States, the Interstate Commerce Commission, and other intervening respondents appealed.

The circumstances in which the amendment was passed are known to everyone. The Standard Oil Company, a New Jersey corporation, owned the stock of the New York Transit Company, a pipe line made a common carrier by the laws of New York, and of the National Transit Company, a Pennsylvania corporation of like character, and by these it connected the Appalachian oil field with its refineries in the east. It owned nearly all the stock of the Ohio Oil Company, which connected the Lima-Indiana field with its system; and the National Transit Company, controlled by it, owned nearly all the stock of the Prairie Oil & Gas Company, which ran from the mid-continent field in Oklahoma and Kansas and the Caddo field in Louisiana to Indiana, and connected with the previously mentioned lines. It also was largely interested in the Tide Water Pipe Company, Limited, which connected with the Appalachian and other fields and pursued the methods of the Standard Oil Company about to be described. By the before-mentioned and subordinate lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic ocean, and carried much the greater part of the oil between those points. Before the recent dissolution, the New York and Pennsylvania companies had extended their lines into New Jersey and Maryland to the refineries, and the laws of those states did not require them to be common carriers. To meet the present amendment the Standard Oil Company took a conveyance of the New Jersey and Maryland lines, and the common carrier lines now end at insignificant places where there are neither market nor appliances except those of the Standard Oil, by which it would seem that the whole transport of the carriers' lines is received. There is what seems to be merely a formal breach of continuity when the carriers' pipes stop. The change is not material to our view of the case.

Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the

duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line.

Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words "who shall be considered and held to be common carriers within the meaning and purpose of this act" obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its co-operating companies were not so engaged no one was. It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation, it does require them not to continue except as common carriers. That is the plain meaning, as has been held with regard to other statutes similarly framed. Atlantic Coast Line R. R. Co. *v.* Riverside Mills, 219 U. S. 186, 195, 203. Its evident purpose was to bring within its scope pipe lines that, although not technically common carriers, yet were carrying all oil offered, if only the offerers would sell at their price.

The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. Rearick *v.* Pennsylvania, 203 U. S. 507, 512. See Texas & N. O. R. R. Co. *v.* Sabine Tram Co. 227 U. S. 111. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act.

The control of Congress over commerce among the states cannot be made a means of exercising powers not intrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates

future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. Hoke *v.* United States, 227 U. S. 308, 323; 188 U. S. 321, 357; Lottery Case, 188 U. S. 321, 357.

These considerations seem to us sufficient to dispose of the cases of the Standard Oil Company, the Ohio Oil Company, the Prairie Oil & Gas Company, and the Tide Water Pipe Company, Limited. The Standard Oil Company of Louisiana was incorporated since the passage of the amendment, and before the beginning of this suit, to break up the monopoly of the New Jersey Standard Oil Company. It buys a large part of its oil from the Prairie Oil & Gas Company, which buys it at the wells in the mid-continent field and transfers the title to the Louisiana Company in that state. Its case also is covered by what we have said.

There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

Section 4.

Economic Monopoly.

LADD *v.* SOUTHERN COTTON PRESS AND MANUFACTURING CO.

53 Tex. 172. 1880.[1]

Moore, Chief Justice. This suit was brought in the district court of Galveston county, August 3, 1877, by Alexander H. Ladd, the appellant, against appellee, The Southern Cotton Press and Manufacturing Company, a corporation under the laws of Texas, carrying on the business of receiving, storing and compressing cotton for such parties as might employ its services in that behalf, to recover back moneys alleged to have been paid by appellant at various times for charges which were uniformly and notoriously demanded and collected by appellee on all cotton entrusted to it.

The right to recover back the money thus paid, is claimed in the petition on the ground that upon the facts stated therein the property and services of appellee had been submitted to public use and had become affected with a public interest; that the charges demanded by appellee were unlawful and without consideration, and that the payments had been made involuntarily and under duress.

The appellee demurred generally and specially, that the facts stated in the petition showed that the business carried on by appellee was a private enterprise and occupation, and not a public employment; that it appeared from the petition that the alleged payments had not been made involuntarily or under duress; that the matters relied on to show duress were insufficient and too vaguely pleaded, and that it appeared from the petition that a large portion of the demand sued for was barred by the statute of limitations.

The demurrer was sustained, and appellant declining to amend, judgment was rendered for appellee. From this judgment an appeal was prosecuted, and appellants assign as error that the court should have overruled, instead of sustaining the demurrer to his petition. In support of this assignment, his counsel make in their brief these propositions, viz.:

First. The petition shows that appellee had submitted its property and services to public use.

1. By becoming incorporated by the legislature for the purpose of carrying on the business designated.

[1] The statement of facts, and argument of counsel have been omitted.—Ed.

2. By virtue of the nature and extent of the business.

3. Because by combination with others in the same line of business, it became a *virtual* monopoly, the exercise of which enabled them to exact fictitious charges, and charges without consideration, as a substantial toll on nearly all of the chief commodity of the state, and thereby its services and property became affected with a public interest.

Second. That the charges complained of having been utterly without consideration, and involuntary or enforced payment having been made under protest and without mutuality of assent necessary to a contract, were in fact made under duress of property.

Are these propositions, or any one of them, applicable to the facts averred in appellant's petition, and if so, should the judgment be reversed? We will consider them in the order in which they are presented.

1. Did appellee, by becoming incorporated by the legislature for the purpose of carrying on a warehouse and compress business, submit its property and services to public use? We are cited to no authority tending to support this proposition, and we are unable to perceive any principle or reason upon which it can be maintained. The petition shows that appellee is a mere private corporation, with no privilege or franchise beyond that of carrying on in a corporate capacity the business in which it is engaged. It is by reason of the nature and character of the business, and not from the fact that it is carried on by an individual or corporation, that the law holds that the property or services of the owner have been submitted to public use.

2. The business of warehousing and compressing cotton, is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public.[2] (Coggs *v.* Barnard, 2 Ld. Raym.; 2 Pars. on Con., 139; Story on Bail., sec. 442.) Nor is it claimed to have been made so by statute. And we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici,* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution) before a demand for such an use could be enforced by the courts.

[2] See *dicta contra* in Nash *v.* Page (1882), 80 Ky. 539.

If the right to regulate property and the character of its employment is, by reason of its extent, and the number of persons interested in or affected by the manner or circumstances of its use, as counsel for appellant forcibly declares, "of the very essence of government," the exercise of this right or power pertains to the legislative and not the judicial department.

3. Evidently appellant does not intend to assert that appellee, by combination with others engaged in like business, acquired a monopoly or "*virtual* monopoly" of the character declared by the constitution of the state to be "contrary to the genius of a free government," and never to be allowed. (Art. 1, sec. 26.) But the import of his proposition, as we understand it, is that appellee and others engaged in the same business, though this business was a legitimate and lawful one, had, without any exclusive right to conduct it, by combination virtually acquired the exclusive control of the business in the city and port of Galveston, which enabled them "to exact fictitious charges and charges without consideration," and thereby to collect "toll on nearly all the chief commodity of the state." And that by reason of this fact the property and service employed in such business became affected with a public interest. But conceding the premises, the conclusion sought to be deduced seems to us to be a *non sequiter*.

It will readily be admitted that in many instances combinations may be made by parties engaged in a particular trade, or by those who, at the time, have the control of the market for some article of prime necessity, to make most unconceivable exactions for their services or demand a most extortionate price for their commodities. But certainly this does not change the nature of the employment in which they are engaged, or authorize the court to say, when the business of the parties is strictly private, that it has become public. If the combination is illegal, the parties to it will subject themselves to such penalties as the law imposes; and if the injury to society to be apprehended from such combinations is of a character demanding it, the legislature may, by adequate provision, regulate or prohibit persons from engaging in them. Nor do we say that there may not be instances where, by combination, or even without it, some particular business, by reason of its extent and magnitude and the great number of persons affected by it, though strictly *privati juris* under the common law and previous statutes, may be declared *publici juris* by the legislature. This seems in effect what was held by the supreme court of the United States to have been done by the legislature of Illinois (4 Otto, 125). But as this is not the character of this case, we are not called upon to express an authoritative opinion on the

point. It is sufficient for us to say that in the absence of legislation to that effect, a party who has not subjected his property and services to public use by the character of the business in which he is engaged, does not do so by reason of combination with others in a like business, though he is enabled thereby to exact from those who may employ him unreasonable and extortionate charges for the services rendered. Whether payments made under such circumstances may not be held to have been paid under duress, is another question to be considered hereafter. Nor can it justly be held that the mere extent and magnitude of the business changes a private charge for services into a toll to be regulated by law. Nor if so, that the court may, in the absence of legislation upon the subject, substitute its judgment as to the proper amount of such toll for the contract of the parties.

But although none of the grounds urged by appellant in support of his proposition, "that appellee had submitted its property and services to public use," taken severally and of themselves warrant his conclusion, a fair consideration of the argument of his counsel requires us to consider the effect, not only of each of the positions, standing alone, upon the business of appellee, but also their effect in the aggregate, in connection with all the facts and circumstances connected with or relating to the business in which appellee was engaged and the manner in which it was conducted and carried on.

In doing this it must be conceded, as alleged in appellant's petition, that appellee and those engaged in the same business at the port of Galveston, with the exception of one small establishment capable of doing but a limited business, had combined and fixed the charges complained of; that the business in which appellee and his confederates were engaged was necessary to the public, in reference to the transit of cotton from the producer to the manufacturer and consumer; that the charges complained of were a common charge against all comers and upon every bale of cotton, and was also a charge demanded and enforced without consideration, a compliance with which was, under the circumstances, essential to the business life of, and the only escape from business ruin by all who follow the business of brokerage in cotton in the city of Galveston.

Now, giving the fullest scope and import to these and other allegations made in the petition, how is it shown that appellee's business is of a character with which the courts of the country have the right to interfere; or from what source, we ask, do they derive their authority to regulate the conditions and terms upon which it shall be conducted? It is not contended by appellant,

that, as ordinarily conducted, the business of receiving, storing, compressing and delivering cotton is *privati* [*publici*?] *juris*, which those engaged in it have not the right to fix the rates and conditions upon which it will be conducted. But the argument seems to be, that, in view of the necessities of trade, its magnitude and effect upon the interest of the people throughout the state, as well as of those engaged in the business of appellant, it has become of like public interest as other occupations and trades which the law pronounces and holds to be *juris publici*. The conclusion sought to be maintained rests upon the hypothesis that whenever it is made to appear that any particular business is of so general public interest as that which the law holds to be *juris publici*, the courts have the power to so declare and hold it. The case of Munn *v.* Illinois, 4 Otto, 125, seems to be the authority mainly relied on to support this position. We cannot regard this case as authority for such a doctrine. It was brought to enforce the statute law of the state. The conclusion to be drawn from it is, as we think, that the legislature may declare a particular business *publici juris*, if the facts and circumstances under which it is conducted justify and the good of society requires it; but not that the court may so treat it in advance of legislative recognition or declaration. Whether this may be done, even by the legislature, without infringing upon the constitution, need not now be considered. Neither is it necessary for us at present to determine whether the submission of property and service to public use (as there is high authority for holding) is solely dependent upon the fact that those engaged in such business enjoy some franchise, privilege or immunity from the state, or did so in the early days of the common law when this character was impressed upon their property or service. (Dissenting opinion of Fields, J., in Munn *v.* Illinois, *supra*, and authorities cited.)

But if it is admitted that appellee's property and services were affected with a public interest, and the amount demanded of, and paid by appellant, was greater than what was reasonable, as it appears from the petition that the payments were made with full knowledge of all the facts and without fraud or deception, unless made under duress, the amount thus paid cannot be recovered back, although so much as exceeds the reasonable value of the services rendered was paid without consideration. (34 Ala., 405; 7 Cush., 125; 59 N. Y., 603; 50 Ga., 304.)

A mere protest against a charge does not entitle the party who voluntarily and without duress or compulsion pays it, to sue for and recover it back. (5 Cush., 115; 29 Md., 415; 25 Ind., 261; 46 Cal., 589; 5 Kan., 412.)

Second. It remains to inquire whether the money sued for was paid without consideration, involuntarily and under duress. There is no pretense of duress except by reason of the alleged combination of appellee and its confederates, to charge a larger amount than the services rendered were reasonably worth; and for the delivery of cotton which appellant says was not in fact actually delivered, and the agreement between appellee and its confederates that they would not do business with any parties who should fail or refuse to pay any of their charges, or who should resort to the courts to controvert or dispute them. As the business in which appellee is engaged is open to all who wished to engage in it, and was not, as we have seen, affected with a public interest, any one engaging in it may prescribe the terms upon which he will transact it. All parties employing his services, knowing his terms, would be bound by them. If it is lawful for a single individual engaged in other business to prescribe the terms upon which he will conduct it, we do not see how it can become unlawful by others in the same employment agreeing with him that they will also transact their business upon the same terms and conditions. (Kirkman *v.* Walker, 6 Term, 14.)

If appellee may lawfully decline doing business for or with those who refuse to comply with the terms which it prescribes, the fact that a failure to conform to these terms would result in its declining in future to transact business with the party thus failing, cannot be held to be duress. On the other hand, if the terms and conditions are illegal and such as a party has no right to prescribe for himself or in combination with all parties engaged in like business, thereby securing a *virtual monopoly,* we can see no better reason for saying in this than in the other case that contracts entered into and business conducted for a series of years with one of the parties to such agreement with knowledge of it, can be held to have been under duress. If the combination is illegal and the terms prescribed by it are such as the parties have no right to demand, certainly the courts are not impotent to restrain the parties to such illegal combinations and give redress to those improperly affected by it. To entitle a party voluntarily paying money to recover it back on the ground of duress, he must, at the time of such payment, be under the necessity of either then making the payment, or of resorting to the courts to get possession of property wrongfully detained, or to recover his liberty, or at least show that there is an apparent necessity for resorting to the courts for one or the other of these purposes.

The petition shows that the transactions between the parties to the suit do not come within either of these categories. Appellant

certainly had ample time and opportunity to have had his day in court, before the business between him and appellee was closed by the last voluntary payment by him. Not having complained until the late date at which this suit was brought, he cannot now be heard to complain. (5 Otto, 112–13; 4 Gill (Md.), 425; 1 Ohio St., 268; 34 Md., 436; 115 Mass., 367.

The judgment is affirmed.[3]

THE INTER-OCEAN PUBLISHING CO. *v.* THE ASSOCIATED PRESS.

184 Ill. 438. 1900.[1]

THE Inter-Ocean Publishing Company, a corporation organized under the laws of the State of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as *The Daily Inter-Ocean* and *The Weekly Inter-Ocean,* which have a wide circulation in the States and Territories of the United States. The Associated Press is a corporation organized under the laws of the State of Illinois in 1892. The object of its creation was, "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news to persons and corporations other than those who are stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder.

The by-laws of the appellee provide, among other things, as fol-

[3] Accord, Delaware, L. & W. R. R. *v.* Central S. Y. & T. Co. (1889), 45 N. J. Eq. 50.

[1] The statement of facts is abbreviated, arguments of counsel are not reprinted, and parts of the opinion of PHILLIPS, J., are omitted.— ED.

lows: "No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from, any person, firm or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors." The by-laws also provide that the board of directors shall have the power to suspend a member for furnishing, or purchasing news contrary to the rule just quoted, and the contract between the appellant and the appellee expressly incorporated these rules.

The appellant bought news from the Sun Printing and Publishing Association of New York, which had been declared antagonistic to the appellee. Certain other newspapers complained to appellee of appellant's conduct in this regard, and appellee notified appellant that a meeting of appellee's board of directors would be held at a time and place mentioned to take action on these complaints. Before the time set for the hearing appellant filed its bill for an injunction against the appellee from suspending or expelling it from its membership, and from refusing to furnish it news according to the terms of its contract. A decree was rendered dismissing the bill for want of equity. On appeal to the Appellate Court for the First District the decree was affirmed, and this appeal is prosecuted.

MR. JUSTICE PHILLIPS delivered the opinion of the court.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the

publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

It was held in New York and Chicago Grain and Stock Exchange *v.* Board of Trade, 127 Ill. 153 (on p. 163): "Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in Friedman *v.* Telegraph Co. 32 Hun, 4, and Smith *v.* Telegraph Co. 42 id. 454. The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news, for purposes of publication, which it was created to furnish.[2]

[2] But see Live Stock Commission Co. *v.* Live Stock Exchange (1892), 143 Ill. 210, in which the Court said in part:

"But we are not prepared to hold that the mere fact that the business of a particular market has become very large, gives to the court any power to declare such markets public and impressed with a public use, or to apply to them any rules of public policy peculiar to that class of markets."

"It is not claimed that the keeping or doing business in a market of this character is one of the employments which the common law declares to be

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.

The clause of the contract in this case which sought to restrict appellant from obtaining news from other sources than from appellee is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition

public, nor is it pretended that it has been made so by statute. Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the Legislature and not for the courts. Accordingly it may be held to be a general, though perhaps not an invariable rule, that the question whether a particular business which has hitherto been deemed to be private, is public and impressed with a public use, is for the Legislature. The doctrine on this subject is stated in Ladd *v.* Southern Cotton Press Manufacturing Company, 53 Tex. 172, where a question very similar to the one under discussion was before the court, as follows: 'We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici*, merely by reason of its extent. If the magnitude of a business is such, and the persons affected by it are so numerous, that the interests of society demand that the rules and principles applicable to public employment should be applied to it, this would have to be done by the Legislature (if not restrained from doing so by the Constitution), before a demand for such use could be enforced by the courts.' The view thus expressed would seem to be precisely applicable to the present case, and we are inclined to adopt it as a correct statement of the law as it should be applied to the facts before us. We do not say that there may not be exceptions to the rule thus stated, but if there are they are not of such a character as to be material here."

"Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their purview is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici*, would be surrounded by very great difficulties, and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test. But when the Legislature, acting upon a competent state of facts, has interposed and declared the business to be *juris publici*, all difficulty is removed."

by contract or otherwise can never be looked upon with favor by the courts. In People *v.* Live Stock Exchange, 170 Ill. 556, it was said (p. 566): "Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law."

The provisions of the contract that the appellant should purchase news from no other source, and the restrictive clause of the by-law, are both null and void, and the contract is the same as if these provisions had not been incorporated therein. Rejecting entirely these illegal provisions, on which the right to suspend the appellant as a member and to refuse to furnish it news and information gathered by the Associated Press for publication rests, no reason is presented, under the pleadings and affidavits in the case, why the appellant is not entitled to an injunction, as prayed for in its bill.

We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the same. The judgment of the Appellate Court for the First District and the decree of the circuit court of Cook county are each reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree as prayed for in the bill.

Reversed and remanded.[3]

[3] Following the principal case, it was determined in News Publishing Co. *v.* Associated Press (1904), 114 Ill. App. 241, that the defendant was under a duty to render news service which it had contracted to render to one of its members upon the same terms and conditions upon which it rendered like service to other newspaper publishers.

In State *v.* Nebraska Telephone Co. (1885), 17 Neb. 126, where it was sought by mandamus to compel the company to give relator telephone service, the Court concluded that the company must serve relator, and said:

"The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are alike situated, and not discriminate in favor of, nor against any." The Court cited in support of this proposition the last part of Lord Ellenborough's opinion in Allnutt *v.* Inglis, *supra*. Although the Court said that "the respondent is not possessed of any special privileges," it is in fact stated in the case that "the wires of respondent pass the office of relator. Its posts are planted in the street in front of his door."

In some other cases virtual monopoly has been referred to as though it were a possible ground for public service duties, although the decisions in those cases have really been reached on the ground of grant of franchises, or statutory duty. See for example, Williams *v.* Mutual Gas Co. (1884), 152 Mich. 499; Wheeler *v.* Northern C. I. Co. (1887), 10 Col. 582; Owensburg G. L. Co. *v.* Hildebrand (Ky., 1897), 42 S. W. 351; Cincinnati H. & D. R. R. Co. *v.* Village of Bowling Green (1879), 57 Oh. St. 336. And see MR. JUSTICE MILLER'S comment on Munn *v.* Illinois, in Wabash, etc., Ry. Co. *v.* Illinois (1886), 118 U. S. 557, 569. See also *dicta* in Nash *v.* Page (1882), 80 Ky. 539.

STATE *ex rel.* STAR PUBLISHING CO. *v.* THE ASSOCIATED PRESS.

159 Mo. 410. 1901.[1]

SHERWOOD, J. The object of this original proceeding is to compel respondent, the Associated Press, to furnish to the Star Publishing Company, for publication in its newspaper, *The Star,* the budget of news collected daily by respondent, and also its Saturday night news reports.

The substance of the issues presented by the pleadings of the parties to this litigation has been very well condensed by counsel for respondent, and we adopt such condensation: Relator asserts: (1) That it has a contract with the Associated Press for the Sunday morning news. (2) That the gathering of general news for publication in a daily newspaper is a public employment, which must be exercised by those who engage in it for all publishers of dailies who may desire it, upon equal terms, and without discrimination. (3) That the Associated Press has, by its charter, assumed this public employment, and so is bound to exercise it on behalf of the relator, upon tender of compensation equal to that paid by other publishers similarly situated, and receiving a similar service. (4) That the Associated Press has broken down all competitors, and secured a monopoly of the business of newsgathering, in consequence of which it is not practicable to publish a daily newspaper without the aid of its service. (5) That the Associated Press has been granted telegraph and telephone franchises by the states of Illinois and Missouri, and also possesses the power of eminent domain. (6) That the by-law of the Associated Press which makes the consent of existing members a condition of admitting new members in any locality is in violation of the anti-trust laws of Missouri, Illinois, and the United States. The respondent, on the other hand, asserts: (1) That it never made any contract with the relator. (2) That the gathering of news, whether for daily newspapers or for other publications, is a purely private business, requiring for its conduct no public franchises or privileges. (3) That, while the Associated Press is in form a corporation for pecuniary profit, in its substance it is but a voluntary association of publishers of newspapers, who have combined their energies for the sake of greater efficiency and economy in newsgathering. (4) That it has not and cannot possibly monopolize the business

[1] Arguments of counsel and considerable parts of the opinion are omitted. — ED.

of newsgathering, and that in fact there are now other general newsgathering agencies in successful operation in the United States. (5 That it does not own or operate telegraph or telephone lines, and has no means for the transmission of news except such as are open to everybody on like terms. (6) That it has never exercised, and does not possess, the power of eminent domain. (7) That it is not a trust in any sense, nor is there anything unlawful in its methods or aims, since that which the combination accomplishes among its members has exclusive reference to a matter of internal economy, and leaves the members unaffected and unrestrained in so far as concerns their relations to the general public. (8) That its business is national and international in its scope and character, and so is protected against state interference by various provisions of the federal constitution, which are cited.

It has been thought best to consider at large the doctrine announced in the case relied on,[2] as well as opposing views, in order to endeavor to discover whether Munn's case, granting it correctly decided, has any application to the case at bar. Following a familiar rule, the general words employed in that opinion should be restricted to the particular facts of that case, and should not be extended to other cases which could not have been in the mind of the court at the time; nor has that court so extended them to any case of similar sort to the one before us.

The controlling element which gave origin to the opinion relied on seems to have been that of a *monopoly*. But, of course, that element can have no place in the present instance, because respondent has been granted no special or exclusive right or privilege by the state, nor has it received any benefits from that quarter. Nor has the respondent acquired any additional right, by reason of its incorporation, to that it possessed before. Every one is at liberty to gather news, and the fact that one has greater facilities or finances for gathering and transmitting news, or that the business has grown into one of great magnitude, widespread in its ramifications, or that mere incorporation has been granted a company organized for the purpose of gathering news, does not and cannot of itself give the state the right to regulate what before incorporation was but a natural right. [Tied. Pol. Pow. p. 234, § 93.]

Were the rule otherwise than as just stated, the effect would be to deprive a person of a right to pursue any lawful calling, or to contract where and with whomsoever and at what price he will. The right thus to contract cannot be interfered with. It is part and parcel of personal liberty, and therefore under the

[2] Munn *v.* Illinois, *supra.*

protection of section 30, art. 2, of our state constitution, and of the fourteenth amendment of the Constitution of the United States, as heretofore quoted. [Cooley, Const. Lim. 944, 945; Ib., Torts, 278; State *v.* Loomis, 115 Mo. 307, and cases cited; State *v.* Julow, 129, Mo. 163, and cases cited. To like effect see Allgeyer *v.* Louisiana, 165 U. S. 589, 591; Williams *v.* Fears, 21 Sup. Ct. Rep. 128, 129, 130.]

If relator's position as to its right to compel respondent to turn over to it the results of its labors and researches after news is correct, then by the same token any citizen could compel any newspaper to admit him as a subscriber; or, as news is a synonym of information, intelligence, and knowledge, then a lawyer profoundly versed in his profession could be compelled to yield his treasures of erudition to some less fortunate member of the bar, of the type described by Swift:

> "Who knows of law nor text nor margent,
> Calls Singleton his brother sargent."

And, even if the business of respondent can justly be deemed a monopoly, then relator's efforts should be directed towards the destruction of that monopoly, and not towards obtaining the mandate of this court compelling relator's admission into that "real genuine article," as counsel are pleased to designate it.

Conceding respondent's business to be in truth a monopoly would furnish an all-sufficient reason and answer for denying the relief relator asks, because the addition of one more monopolist to a monopolistic organization would not lessen its monopolistic features, or abate its vicious tendencies. But there is nothing here on which a monopoly can attach. The business is one of mere *personal service; an occupation.* Unless there is "property" to be "affected with a public interest," there is no basis laid for the fact or the charge of a monopoly. [See, on this point Morris *v.* Colman, 18 Ves. 437 (per LORD ELDON); Mogul S. S. Co. *v.* McGregor, 23 Law R. Q. B. D. 598, 609 (per LORD ESHER); Express Cases, 117 U. S. 1, 21, 24; Railway *v.* Pullman Car Co., 139 U. S. 79, 89–91.]

Nor is there any more property in "news," to wit, "information," "intelligence," "knowledge," than there is in "the viewless winds," until the "guinea stamp" of a copyright is impressed upon its external similitude, thus giving it one of the elements of property, to wit, governmental protection for a limited period. That there is no monopoly, even in fact, in the business in which respondent is engaged, is shown in the clearest possible manner by this record. Other newsgathering agencies have the same facilities over the wires of the Western Union Telegraph as has

the Associated Press. The terms of the telegraph company are uniform as to all organizations, and such other agencies are at work in their occupation, and, it would seem, with great success. Hundreds of daily newspapers in every quarter of the Union, leaders in point of circulation in their respective localities, look for their news supplies to some other agency than that of respondent. Some publishers accustomed to receive reports from respondent have discontinued their business relations with it, and gone to some rival or competing organization. The New York *Sun*, repeatedly urged to join the respondent, has continuously declined. And the relator company, notwithstanding the allegations of its petition that its paper could not be published with a profit without the aid of the Associated Press, Mr. Lowenstein, the *Star's* business manager, gives it as his opinion under oath that "the *Star* prints a better budget of news than any of its rivals."

For the purpose of obtaining its supplies of news the *Star* is affiliated with the New York *Sun* or Laffan News Bureau, and concerning the efficiency of that service Mr. Laffan, testifying, says: "It has no equal at all, from our point of view;" and, answering the question whether, "as a matter of fact, it is better than the Associated Press?" answered, "Of course it is; everybody knows that." And Mr. M. E. Stone, general manager of the Associated Press, says that the Scripps-McRae service is an excellent one.

If these statements are to be taken as true, and so they will be regarded for the purpose of this case, relator has no standing in court, because Lord Ellenborough, in the Allnutt-Inglis case, *supra*, after commenting on the fact that the London Dock Company's warehouses were the only places where wines of importers could be bonded, went on to say: "If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly." [12 East, loc. cit. 540.]

And because, further, a court in circumstances as above related will not award a discretionary writ as now here prayed for the mere purpose of determining an empty and barren technical right in behalf of a petitioner, it will "let well enough alone."

Subsidiary to considerations heretofore mentioned may be suggested others tending in the same direction. In Mathews *v.* Associated Press 15 N. Y. Supp. 887, defendant, a corporation organized under the act "to incorporate the Associated Press of the state of New York" (Laws 1867, c. 754), adopted a by-law prohibiting its members from receiving or publishing "the

regular news dispatches of any other news association covering a like territory, and organized for a like purpose." A suspension of all the rights and privileges of the association was provided as a penalty for a violation of said provision. In an action to restrain defendant from enforcing this penalty, held that the association had power to enact the by-law; that it was not objectionable either as unreasonable and oppressive or as tending to restrain trade and competition and to create a monopoly.

It appeared that, while defendant only appoints and engages agents, in the strict sense of the term, in the state of New York, by virtue of contracts with other associations, it receives from them news collected from the principal portions of the civilized world. Plaintiffs are also members of, and they publish the news received from, another press association, which collects its news, by its own agents, from substantially the same territory. Held further, that this action of plaintiffs came within the prohibition of the by-law, and authorized defendant to enforce the penalty.

The court in general term, among other things, said: "The business of collecting the news of the day and furnishing reports of it to the press for a compensation has become a very well known and important industry. It can scarcely be called a branch of trade. There is no right of property in the news itself. That is neither bought nor sold. Any man who hears it may make such use of it as he can for his own advantage, or may communicate it to others. So he may make a business of collecting news, and furnishing reports of it to the newspapers, or to such of them as will compensate him for his trouble. The work is commonly done in the locality of each newspaper by its own reporters, employed and paid for that purpose. . . . In this case the agents are employed by the defendant, the Associated Press of the state of New York, acting for all the publishers who are comprised in its membership. As to all these the charter and by-laws of the corporation constitute the contract between themselves and between them and the association. Among the provisions of that contract is one to the effect that none of the members shall contract with any other news association to employ for them agents for the procurement of news within the same territory as that in which agents of the defendant association are employed. This contract between the members of the association is mutual, and is for the common benefit, and so is supported by a sufficient consideration. It is for the common benefit, because the efficiency of the association depends upon the number and activity of its agents, and these largely upon the extent of its revenues, from which salaries are paid, and that in turn upon

the number of its patrons; so the building up of competitors, which must draw off from its patronage, will necessarily detract from the extent and value of its work. The contract, therefore, of the associates with each other and of those with the association, which is embodied in the by-law in question, seems to us not to exceed the proper bounds of self-protection, and not to be unreasonable nor obnoxious to any principle which has been invoked for its condemnation."

This ruling of the supreme court was unanimously affirmed by the court of appeals, Mr. Justice PECKHAM delivering the opinion, who afterwards delivered the opinion of the court in U. S. *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290.

In a prior case, Dunlop's Cable News Co. *v.* Stone 15 N. Y. Supp. 2, the contention was made that news-gathering was a "public business."

The Cable News Company was a corporation engaged in collecting news and selling the same to all newspapers applying therefor. The New York Associated Press was an association of newspaper proprietors also engaged in the business of collecting news and furnishing it to newspapers. The association had a by-law to the effect that none of its members should take news from any other agencies. For violation of this by-law by a number of publishers the association threatened to discontinue its service to them. The suit was to enjoin the association from such proposed action. The plaintiff alleged that the business engaged in by the parties was "a public business, and that both plaintiff and the said New York Associated Press are, therefore, under an obligation to serve the entire public; and that it is essential for the proper conduct of a newspaper, and for the interests of its readers, subscribers, and advertisers, and for the interest of the public, that such newspaper should be at liberty to avail itself of all sources of information, and combine, if it think best, the intelligence and information furnished by the various agencies instituted for that purpose."

A motion for an injunction *pendente lite* was denied. On appeal to the general term the ruling below was sustained. The court said: "The plaintiff's application amounted to nothing more nor less than an attempt to restrain the defendants from transacting their lawful business in their own way, lest in doing so plaintiff's rival business should be injured or diminished. The defendants have a perfect right to limit the sale of the news which they collect to those who contract to deal exclusively with them. They are private individuals, dealing, it is true, with a large public, but governed by no corporate duty or statutory obligations. They

certainly owe no duty to the plaintiff, which is a foreign corporation attempting to compete with them, and with whom they have no privity or relations of any kind."

In the latter case the defendant association was not incorporated, in the former it was; but both cases were treated alike in this respect.

And it has been determined that: "A voluntary association, whether incorporated or not, has, within certain well-defined limits, power to make and enforce by-laws for the government of its members. Such by-laws are ordinarily matters between the association and its members alone, and with which strangers have no concern." [Live-Stock Commission Co. *v.* Live-Stock Exch., 143 Ill. 210.]

The charter of respondent, after emendation, is couched in these words: "The object for which it is formed is to buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same." Under the terms of its charter respondent owes no duty to relator, since it possesses no greater right in regard to the gathering and purchase, etc., of news than its incorporators possessed as individuals before the act of incorporation. (Authorities *supra.*) But on the basis that the charter, by-laws, etc., place respondent on the plane of any other corporation in charge of a "public utility," relator asserts that respondent's business is to be regarded in the same light precisely as a railroad, telegraph, or telephone company; that it involves a public franchise. But in Live-Stock Commission Co. *v.* Live-Stock Exch., *supra,* it was ruled that: The mere fact that the business of a particular market owned by a private corporation has become so large as to influence the commerce of a large section of the country will not give the courts any power to declare such market public, and impressed with a public use, or to apply to it any rules of public policy peculiar to that class of markets. That power belongs alone to the legislative department of the state. [See Express Cases, *supra;* Railroad *v.* Railroad, 41 Fed. Rep. 559, 569 (Per Caldwell, J.); Interstate Commerce Commission *v.* Railway, 167 U. S. 479, 499; Railway *v.* Central Stock Yards Co., 45 N. Y. Eq. 50.]

In making this ruling, not only was Munn's case on the *point involved,* cited with approval, but, in addition thereto, Ladd *v.* Southern Cotton Press Co., 53 Tex. 172, was cited, and its language approvingly quoted:

"We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it are so numerous, that the interests of society demand that the rules and principles

applicable to public employments should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution), before a demand for such use could be enforced by the courts."

It is not pretended here that such legislation would make respondent corporation's business *juris publici* has been enacted, granting that such legislation could have any extraterritorial effect (as to which see Vawter *v.* Railroad Co., 84 Mo. 679; State *v.* Gritzner, 134 Mo. 512, and cases cited; Harris *v.* White, 81 N. Y., loc. cit. 544).

It is needless to discuss in this connection cases which bring into view the duties of railroad, telegraph, and telephone companies, since, those companies having accepted legislative favors, right of eminent domain, etc., must shoulder the burdens along with the benefits, and their business becomes by such acceptance *ipso facto publici juris*. Not so, however, with respondent, which was granted no privileges, asks none, and cannot, therefore, be burdened with conditions such as pertain to common carriers and the like.

As to the case of Minnesota Tribune Co. *v.* Associated Press, 83 Fed. 350, it seems to recognize the validity of such contracts by the Associated Press as are the subject of complaint here. But, if this is not so, we prefer the ruling and reasoning on this point in Mathews' Case.

In regard to New York & Chicago Grain & Stock Exch. *v.* Board of Trade of City of Chicago, 127 Ill. 153, much relied on by relator: For many years the board of trade had been accustomed to furnish to all customers the telegraphic reports as to daily and hourly conditions of the grain and other markets. Having done so for such a long time, it undertook suddenly to disrupt those long-continued business relations, and leave the plaintiff, a corporation engaged in the commission business, without any means of conducting its ordinary and long-established business; and upon this basis it was very properly held that plaintiff was entitled to injunction to prevent the threatened disruption of business. This was the very gist of the decision in that case, and we need not say whether we fully indorse much of the language and of the reasoning used in arriving at the conclusion reached; and this reason, among others, occurs why we need not, and that is, respondent has never entered into business relations with relator, and consequently there are no such relations to be severed, and no such injurious results can occur in this case as in the one referred to.

Relative to the recent decision by the supreme court of Illinois in Inter-Ocean Pub. Co. *v.* Associated Press, to which our atten-

tion has been called, the Inter-Ocean Company was engaged in publishing two newspapers in Chicago, the *Daily* and the *Weekly Inter-Ocean*. A contract was entered into between the parties as to furnishing news in accordance with the by-laws of the Associated Press. This contract the Inter-Ocean Publishing Company violated by procuring and publishing news obtained from other news concerns located in the city of New York. Being notified by the Associated Press to appear to answer such charges of violation of contract, the Inter-Ocean Publishing Company resorted to injunction to prevent expulsion for violation of the by-laws of the Associated Press, which formed part and parcel of the contract between the parties. The Inter-Ocean Publishing Company admitted in its bill for injunction that it had violated its contract, and, seemingly by way of excuse, alleged that it could not obtain all the news from the other contracting party, and so was forced to engage the services of other news-gathering associations. Answer was filed, and, upon hearing had, the bill was dismissed for want of equity, and this decree was affirmed in the appellate court. But when the cause reached the supreme court the decrees of the lower courts were reversed, and the cause remanded, with directions to enter a decree as prayed. The rulings in that case were: (1) The by-law and contract created a monopoly. (2) That it was necessary to publish news from other sources to make a check on the defendant. (3) That the by-law tends to restrict competition, because it prevents members from purchasing news from any other source. (4) That the contract and by-law are void, as being beyond the power of the defendant to make. (5) That the "obligation [of the defendant] to serve the public is one not resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that public interest has attached thereto." And (6) that the fact that the defendant possessed the right to use the power of eminent domain as to telegraph and telephone lines, although not exercised, contributed to determine the character of its corporate organization. And on these grounds was based the ruling that the defendant must furnish every one applying with the same service of news. The above decision is evidently at war with the rulings in the Live-Stock Commission case, *supra*, where "the amount of business annually transacted at said stock yards is such as to constitute the market thus established the largest live-stock market in the world." If the facts just related did not impress the business with a public use, it is difficult to conceive what facts could do so; and, in addition to the utterances heretofore quoted in the Live-Stock Commission case, the court there also said: "The views here expressed

do not conflict with what was decided in Munn *v.* Illinois, 94 U. S. 113. The question raised and decided in that case was as to the constitutionality of the act of the legislature of this state declaring certain grain elevators to be public warehouses, and prescribing rules for their management, and fixing maximum charges for the storage and handling of grain. There the legislative department had interposed, and declared the public use; and the court, in holding the act constitutional, held merely that the legislative power had been properly exercised. This was the only question having any relevancy here presented in that case, or which the court undertook to decide; and the discussion of the evidence showing that the business carried on in said grain elevators was of such character that it had in fact become impressed with a public use was only for the purpose of showing that a condition of things existed which justified the legislature in passing the statute then under consideration." [143 Ill., loc. cit. 239.]

That case clearly announces that it is necessary in cases like the present one that the *Legislature* should declare that the business "had in fact become impressed with a public use"; something which, as there stated, the courts were powerless to declare. But that case was wholly ignored in the case under comment.

For these reasons, besides those already given during the course of this investigation, we decline to follow that case or regard its rulings authoritative.

Moved by these considerations, we deny the peremptory writ. All concur.

CHAPTER II.

THE SERVICE TO BE RENDERED.

Section 1.

What Service Must Be Rendered.

FISH *v.* CHAPMAN.

2 Ga. 349. 1847.[1]

Nisbit, J., delivered the opinion of the court.

The Court below decided that the plaintiff in error under his contract with Chapman & Ross was a *common carrier,* to which opinion he excepts. The evidence upon this point is the contract and nothing more. It does not appear that carrying was his habitual business; all that does appear from the record is, that he undertook upon a special contract, and upon this occasion, to haul on his own wagon for a compensation specified, the goods of the defendants from the then terminus of the Central Rail Road to the city of Macon. Does such an undertaking make him a common carrier? That is the question, and we are inclined to answer it in the negative. A *common carrier* is one who undertakes to transport from place to place for hire, the goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods. See Mr. Smith's able commentary on the case of Coggs *v.* Bernard, 1 Smith Leading Cases, 172; Forward *v.* Pittard, 1 T. R. 27; Morse *v.* Slew, 2 Lev. 69; 1 Vent. 190, 238; Rich *v.* Kneeland, Cro. Jac. 330; Maving *v.* Todd, 1 Stark, 72; Brook *v.* Pickwick, 1 Bing. R. 218. Railway companies are common carriers. Palmer *v.* Grand Junction Canal Co., 4 M. & W. R. 749.

"Common carriers (says Chancellor Kent), undertake generally and *for all people indifferently,* to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price." 2 Kent, 598.

A *common carrier* is bound to convey the goods of any person offering to pay his hire unless his carriage be already full, or the

[1] The statement of facts, arguments of counsel and parts of the opinion are omitted.— Ed.

risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying. Jackson *v.* Rogers, 2 Show. 327; Riley *v.* Horne, 5 Bing. R. 217; Lane *v.* Cotton, 1 Ld. Ray. R. 646; Edwards *v.* Sheratt, 1 East. R. 604; Batson *v.* Donovan, 1 B. & A. R. 32; 2 Kent, 598; Elsee *v.* Gatwood, 5 T. R. 143; 1 Pick. R. 50; 2 Sumner R. 221; Story on Bail. 322, 323; Dudley S. C. Law and Eq. R. 159.

It is from these definitions and from the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer then that the business of carrying must be *habitual* and not *casual.* An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own State owning a wagon and team, who do not occasionally contract to carry goods. It would be contrary to reason, and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier, who might once a year or oftener at long intervals, contract to haul goods from one point in the State to another. Such a rule would be exceedingly inconvenient to the whole community, for if established, it might become difficult in certain districts of our State to procure transportation.

The undertaking must be general and for *all people indifferently.* The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public, he must undertake for *all people.* A *special* undertaking for *one man* does not make a wagoner, or anybody else, a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point therefore, we say, that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a *common carrier* and subject to all his liabilities.

One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By

this test was Mr. Fish a common carrier? There is no evidence to make him one but his contract with Chapman & Ross. Suppose that after executing this contract, another application had been made to him to carry goods, which he refused, could he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books, but one to which I shall presently advert, which would make him liable upon proof of a single carrying operation.

Upon these views we predicate the opinion, that the plaintiff in error was not a common carrier. From the way in which the opinion of the court is expressed in the bill of exceptions, I am left somewhat in doubt whether the able judge presiding in this cause, intended to say that the plaintiff in error was a common carrier, or that under his contract he was liable as such. If the former, we think he erred; and if the latter, as we shall more fully show, we think with him. In either event we shall not send the case back; for if he meant to say that the plaintiff upon general principles was a common carrier, thinking as we do that he is liable under this contract as such, he will not be benefited by the case's going back.

In conflict with these views, it has been held in Pennsylvania, that "a wagoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment." GIBSON, Chief Justice, in Gordon *v.* Hutchinson, 1 Watts & Serg. R. 285. This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favour the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient. See Story on Bail. secs. 457, 495; Bac. Ab. Carrier A.; 2 Bos. & Pul. 417; 4 Taunt. 787; Jones Bail. 121; 1 Wend. R. 272; 6 Taunt. R. 577; 2 Kent, 597.

THE CITIZENS' BANK *v.* THE NANTUCKET STEAMSHIP CO.

2 Story, 16. 1841.[1]

STORY, J. This cause has come before the Court under circumstance, involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel

[1] The statement of facts and arguments of counsel, as well as a part of the opinion dealing with questions of evidence, are omitted.— ED.

on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment.

The suit is in substance brought to recover from the Steamboat Company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence; and are no otherwise ascertained, than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know. The libel is not *in rem*, but *in personam*, against the Steam Boat Company alone; and no question is made (and in my judgment there is no just ground for any such question), that the cause is a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and, therefore, it is properly to be entertained by this Court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of, before we consider those, which constitute the main points of the controversy. In the first place, there is no manner of doubt, that steamboats, like other vessels, may be employed as common carriers, and when so employed their owners are liable for all losses and damages to goods and other property intrusted to them as common carriers to the same extent and in the same manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and

avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the boatman employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori,* they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend, that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence, to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see, how the Court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, com-

mon carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ,* but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit,* to or for the benefit of the Company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining, what the true understanding of the parties is, as to the character of the bailment.

In the next place, if it should turn out, that the Steamboat Company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the steamboat to another at their risk, as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the Company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter; upon the plain ground, that they are responsible for the gross negligence of their agents within the scope of their employment.

Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed

to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, whether the Steamboat Company were, or held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms; or the employment of the steamboat was, so far as the Company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire; and money and bank bills, although known to the Company to be carried by the master, were treated by them, as a mere personal trust in the master by the owners of the money and bank bills, as their private agent, and for which the Company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers.

The question has been made at the bar, upon whom in this case the burthen of proof lies to establish, that the Company were common carriers of money or bank bills, or not. It does not appear to me to be of any great importance in the actual posture of the present case, how that matter is decided. But I have no doubt, that the *onus probandi* is upon the libellants to establish the affirmative; for until that is done, no liability can attach to the respondents; and the libellants are bound to establish a *primâ facie* case; and indeed it is scarcely within the rules of evidence to call upon the respondents to establish the negative. But it seems to me the less necessary to sift this matter, since the evidence on the part of the libellants is in my judgment sufficient to establish such a *primâ facie* case, at least to the extent of a compliance with the exigency of the rule.

It is abundantly proved, that the masters of the steamboat have been constantly and habitually employed in the transportation of money and bank bills for banks and private persons (as indeed common packet masters were likewise employed long before steamboats existed) upon this very route, and upon the common routes from Nantucket to other ports. This usage, or practice, or employment (call it which we may), was so notorious, that it must be presumed to be known to the Steamboat Company; and indeed, that fact is not contraverted. Under such circumstances the natural inference would be, that the transportation of money and bank bills was within the scope of the usual employment of the master in his official capacity, and on account and at the risk of the owners, unless the inference were repelled by other circumstances. The *onus probandi* then, of disproving this inference, may be deemed to be fairly shifted upon the respondents.

The ground of the defence of the Company is, that in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were in fact common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master in receiving and transporting money and bank bills acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the Company or by their authority; that in truth he acted as a mere gratuitous bailee or mandatary on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the Company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defence against the present suit.[2]

THOMPSON *v.* LACY.

5 Eng. Com. L. Rep. 285. 1820.[1]

TROVER for goods. Plea, not guilty. At the trial before ABBOTT, C. J., at the London sittings after last Trinity term, it appeared the defendant kept a house of public entertainment, called the *Globe Tavern and Coffee House,* in Fore Street, Mooregate, where he provided lodging and entertainment for travellers and others. No stage coaches or wagons stopped there, nor were there any stables belonging to the house. The plaintiff, in December, 1818, having lived before that time in furnished lodgings in London, went to the defendant's house and engaged a bed; he continued to reside there for several months, and then left the place. The defendant, in his bill, charged for eighty-three nights' lodgings; and claimed to detain the goods mentioned in the declaration, on account of money due to him for lodging and entertainment provided for the plaintiff. Upon these facts, the Lord Chief Justice

[2] After a lengthy review of the evidence the court decided that the decree of the District Court in favor of the Steamboat Company ought to be affirmed.— ED.

See People *v.* Babcock (1878), 16 Hun (N. Y.) 313, where an express company was found not to be a common carrier of glass; Collier *v.* Langan T. S. & M. Co. (1910), 147 Mo. App. 700, where defendant was found to be a common carrier of household goods only; Tunnell *v.* Pettijohn (1836), 2 Harr. (Del.) 48, where defendant's profession as a common carrier was held not to extend to objects too large to be conveniently carried on his cart.

[1] Concurring opinions of ABBOTT, C. J., and BEST, J., are omitted.— ED.

was of opinion, that the defendant had a lien upon the goods, and the plaintiff was nonsuited, with liberty to move to enter a verdict for nominal damages, the defendant undertaking, in that case, to re-deliver the goods. A rule nisi having accordingly been obtained in the last term for that purpose,

Marryat and *E. Lawes* now showed cause, and referred to Parkhurst *v.* Foster, 1 Salk. 387.

Gurney and *F. Pollock, contra,* in support of the rule cited Calye's Case, 8 Coke, 683.

BAYLEY, J. I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travellers, who, in London, reside either in lodgings or in inns. The defendant did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does; but he provided lodgings, and that in the way they are provided at inns; for the charge was at so much per night. In the Six Carpenter's case, 8 Coke, 290, a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with everything which he has occasion for whilst on his way. It has been said, however, that in London the character of inn belongs only to those houses of public entertainment frequented by wagons and stage coaches. Now if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a post-chaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged, that to constitute an inn there should be stables annexed to it: if that were so, many inferior houses of entertainment in the country, frequented by foot travellers, would not come within the description; and the poorer travellers would not have the protection which the law gives to a guest against an innkeeper. I think, therefore, that in point of law this is an inn, and that the defendant is under the obligations to which innkeepers are liable, viz., that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill. This rule must, therefore, be discharged. Rule discharged.[2]

[2] "But it has been decided that a man may be an innkeeper, and liable as such, though he has no provision for horses." Kisten *v.* Hildebrand

KANSAS PACIFIC RY. CO. *v.* NICHOLS, KENNEDY & CO.

9 Kan. 235. 1872.[1]

VALENTINE, J. The main question in this case is whether the railway company, when it took the cattle of the plaintiffs below for the purpose of transporting them over its road, assumed the responsibilities of a common carrier or not. We think it did. This question has already been decided in this court in the case of the Kansas Pac. Ry. Co. *v.* Reynolds, 8 Kan. 623. In the case of Kimball *v.* Rutland & B. R. Co. 26 Vt. 247, 254, *et seq.*, the court decided that "a railway company that transport cattle and live-stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and, with the relation, the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment." See, also Welsh *v.* Pittsburg, Ft. W. & C. R. Co. 10 Ohio St. 65. In the case of the Great Western Ry. Co. *v.* Hawkins, 18 Mich. 427, 433, the supreme court of Michigan use the following language: "The company in this case must be regarded as common carriers, and liable as such, except so far as that liability was qualified by the special contract." The special contract just mentioned was a contract to transport nineteen horses from Paris, Canada, to Detroit, Michigan, and there is nothing in the contract or in the report of the case that tends to show that the company held themselves out as common carriers of live stock, or that they anywhere agreed or admitted that they were such carriers, and they carried these horses under a *special* contract. See, also, the authorities cited in the brief of defendants in error, and 2 Redf. Rys. (4th Ed.) 144, note 2, and cases there cited; Wilson *v.* Hamilton, 4 Ohio St. 738; Sager *v.* Portsmouth R. Co. 31 Me. 228; Clarke *v.* Rochester & S. R. Co. 14 N. Y. 570; North Mo. R. Co. *v.* Akers, 4 Kan. 453; Keeney *v.* Grand Trunk Ry. Co., 59 Barb. 104; Welsh *v.* Pittsburg, Ft. W. & C. R. Co. 10 Ohio St. 65. It is claimed

(1848), 9 B. Mon. (Ky.) 72, 74. "Edwards says, a hotel 'is only an elegant kind of common inn.' (Edwards on Bailments, 401.) The same author remarks, in a note at the bottom of page 402, 'Every hotel is an inn, but not every inn is a hotel.' At common law, any person may keep an inn for the public accommodation, without a license, as the keeping of it is not a franchise, but a lawful trade open to every citizen. (The Overseers, etc., *v.* Warner, 3 Hill R. 150.) And I am of the opinion any person may keep an inn, tavern or hotel, in this State, without having a license to sell strong or spiritous liquors and wines to be drank in his house." People *v.* Murphy (1861), 5 Parker's Crim. R. (N. Y.) 130, 132.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

that a different doctrine has recently been held in Michigan. Michigan South. & N. I. R. Co. *v.* McDonough, 21 Mich. 165.

This is certainly true with respect to the railroad then under consideration by the court; but whether it is true with regard to all railroads in the state of Michigan is not so certain. See pages 189, 198, and 199 of the opinion, and the comments of the court on the provisions of the charter of the Michigan Southern Railroad Company, and the act consolidating it with the Northern Indiana Railroad Company. But if this decision does not apply to all the railroads of Michigan as well as to the Michigan Southern & Northern Indiana Railroad Company, under its peculiar charter, does it in any manner indicate what the law is in Kansas? We think not, or but very little at most. In Michigan, since April, 1870, railroads have not been public purposes, or public uses, in the sense that they are such in the other states of the Union. In that state they are purely and strictly private purposes or uses. People *v.* Salem, 20 Mich. 452, 475, 480, 485. The supreme court of that state say that "they (railroad companies) are public agents in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense." "Our policy in that respect," say the court, "has changed; railroads are no longer public works, but are private property." Railroads are private, according to that decision, in the same sense that the different kinds of business of hackmen, draymen, proprietors of stage-coaches, merchants, newspaper proprietors, physicians, manufacturers, mechanics, hotel-keepers, millers, etc., are private. Railroads in Michigan seem from that decision to be such private corporations as are described in the case of Leavenworth Co. *v.* Miller 7 Kan. *524, *535. If they are such private corporations as there described, of course they have a right to be common carriers of just such property as they choose, no more and no less. This is not so in Kansas. The railroads of Kansas are organized upon a different basis. In Kansas they are endowed with a kind of *quasi* public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their benefit, and they are so far public, that other public aid may be extended to them. It is believed that no railroad has yet been built in Kansas that has not been aided both by the exercise of the power of eminent domain, and by other public aid, such as lands and county or municipal bonds. Railroads are public purposes in no sense except in the sense of being common carriers of freight and passengers. It is true that there are incidental public benefits arising from the creation and operation of railroads, such as the increase in the value of property along their routes, the increase

of the public revenues, etc., but these are only incidental benefits, and are not at all what make railroads public purposes. And this public character of railroads is stamped upon them by the sovereign power where it authorizes their coming into existence; for otherwise they could receive no public aid until the roads should be constructed and in operation, and until the roads should become public purposes by virtue of becoming common carriers of freight or passengers. And if they were created absolutely private corporations they could become common carriers only by holding themselves out as such, and by actually carrying freight or passengers.

We suppose it will not be contended that any kind of public aid could be extended to a purely private corporation. If a railroad company is created as a private carrier, and not as a public or common carrier, we suppose that no one will contend that the sovereign power of eminent domain could be exercised for its benefit in its construction, or that any public aid of any kind whatever could be extended to it. That railroads are *created* common carriers of some kind, we believe is the universal doctrine of all the courts. The main question is always whether they are common carriers of the particular thing then under consideration. The question in this case is whether they are common carriers of cattle. So far as our statutes are concerned no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares, and merchandise, or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of all kinds of property which the wants or need of the public require to be carried, and which can be carried by railroads; and particularly we would infer that railroads were created for the purpose of being common carriers of cattle. As Kansas, and all the surrounding states and territories, with their boundless prairies and nutritious grasses, are destined to be great stock-growing countries, it can scarcely be supposed that the legislature in providing common carriers for the property of the public should have omitted to provide for one of the most important kinds of property, a vast source of unbounded wealth. We have no navigable streams within the boundaries of Kansas upon which to transport cattle, and hence they must be transported by railroad, if transported by any means except by driving them on foot.

It is claimed, however, that "the transportation of cattle and live-stock by common carriers *by land* was unknown to the common law." Suppose it was; what does that prove? The transportation

of thousands of other kinds of property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers and by railroads every day. We get our common law from England. It was brought over by our ancestors at the earliest settlement of this country. It dates back to the fourth year of the reign of James I., or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of the laws of England as they then existed now constitute our common law. It is so fixed by statute in this state (Comp. Laws, 678; Gen. St. 1127, § 3), and is generally so fixed by statute or by judicial decisions in the other states. The reason why cattle and live-stock were not transported *by land* by common carriers, at common law, was because no common carrier at the time our common law was formed had any convenient means for such transportation.

Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed are the following: reapers, mowers, wheat-drills, corn-planters, cultivators, threshing-machines, corn-shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam-engines, sewing-machines, washing-machines, pianos, reed organs, fire and burglar proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried. He might have been a private or special carrier of goods, wares, and merchandise, or of any other kind of property, or he might have been a public or common carrier of cattle, live-stock, or any other kind of property, just as he chose. All personal property was subject to be carried by a common carrier, and no personal property was exempt. Whether a person was a common carrier depended wholly upon whether he held himself out to the world as such, and not upon the kind of property that he carried. A common carrier was such as undertook, "generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as a price." 2 Kent, Comm. 598. And he could hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it to the world by the issuing of cards, circulars, advertisements, etc., or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railroads hold themselves out as common carriers by an act irrevocable on their part in their very creation and organization. The very nature of their business is such that by engaging in it,

or offering to engage in it, they hold themselves out as common carriers.

But let us return to the point more especially under consideration. At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc. If he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses. Tunnell *v.* Pettijohn, 2 Harr. (Del.) 48. And it seems to us clear, beyond all doubt, that if any person had, in England, prior to the year 1607, held himself out as a common carrier of cattle and live-stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live-stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be a common carrier of all kinds, or any kind, and of just such kinds, of personal property as he chose; no more, nor less. Of course, it is well known that at the time when our common law had its origin, that is, prior to the year 1607, railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules so far as applicable which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live-stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for, if such were the case, they would be carriers of but very few of the innumerable articles that are now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which

the common law would have permitted to be carried by common carriers in any mode, either by land or water, which, probably, includes all kinds of personal property. Our decision, then, upon this question is that whenever a railroad company receive cattle or live-stock to be transported over their road from one place to another, such company assume all the responsibilities of a common carrier, except so far as such responsibilities may be modified by special contract.[2]

[2] A railroad company is bound to receive and carry cattle, unless it has a reasonable excuse for its refusal. Chicago & A. R. R. Co. *v.* Erickson (1879), 91 Ill. 613. A railroad carrying livestock is liable as a common carrier. Maynard *v.* Syr. B. & N. Y. R. Co. (1878), 71 N. Y. 180; Evans *v.* Fitchburg R. Co. (1872), 111 Mass. 142. A railroad is not a common carrier of cattle transported unless it is proved to have assumed all of the liabilities of a common carrier. Lake Shore & M. S. R. R. Co. *v.* Perkins (1872), 25 Mich. 329. A railroad may refuse to become a common carrier of dogs. Honeyman *v.* Oregon & C. R. R. Co. (1886), 13 Oreg. 352.

"We might further add that in these days there would be little reason for holding that a railway common carrier should be required to accept money to be shipped as freight, because there is operated in connection with almost every such carrier in the country express companies who make a specialty of carrying money and other valuable and small packages." Chesapeake & O. Ry. Co. *v.* Hall (1910), 136 Ky. 379, 389. And see, Kuter *v.* Michigan C. R. R. Co. (1853), Fed. Cas. No. 7955.

As to goods improperly packed, or of dangerous character, as nitroglycerine, dynamite, gunpowder, aqua fortis, oil of vitriol, matches, etc., see California Powder Works *v.* Atl. & Pac. R. R. Co. (1896), 113 Calif. 329. See also Sutcliffe *v.* Gr. W. Ry. [1910], 1 K. B. 478, 494.

"A common carrier may, under certain conditions, hold itself out to the public as being a common carrier of certain articles of freight, and if it was only engaged in the carriage of specific articles, it would not be under any obligation to carry any other things." *Dictum* in Crescent Coal Co. *v.* L. & N. R. R. Co. (1911), 143 Ky. 73, 79.

"The proposed road, when completed, is to be used solely 'for the purpose of transferring, in railroad cars, freight between the different depots, warehouses, elevators, manufactories, etc., that are or may be on its line, or may be reached by its lateral tracks,' and the point is made that a company whose line of road is limited to a single street, and whose proposed business is so circumscribed, does not come within the purview of the act authorizing the incorporation of railway companies by general law. The argument is, that the legislature, in providing a general law on the subject, must have intended to include only such companies as would perform the usual functions of common carriers, and as the company in question does not propose to receive shipments of freight generally, or carry passengers at all, it is contended the appellee is not, within the meaning of the act, a railway company, and hence its supposed organization was unauthorized, and all acts done under it are illegal and void. The proposed business of this company is clearly such as is usually, if not uniformly, done by railway companies, and we are aware of no rule of law requiring a railway track to be of any particular length, or that it should extend beyond the limits of a particular town or city, though most railroads certainly do.

"Nor do we see anything in the objection that the business of the company is to be limited to the carrying of freight offered in cars only. Every common carrier has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligations to carry passengers, and *vice versa*. So if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will nevertheless be a common carrier." Wiggins Ferry Co. *v.* E. St. L. Ry. Co. (1883), 107 Ill. 450, 457.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO. *v.* HENRY.

170 Ind. 94. 1908.[1]

HADLEY, J. So far as expression has been given, there is unanimity among the courts of this country that a railroad corporation, as a common carrier, is under no legal duty to haul show cars, that is, cars owned and fitted up by showmen and used exclusively by them to house and transport their employees and show property as a complete outfit from place to place over railroads. Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Chicago, etc., R. Co. *v.* Wallace, 66 Fed. 508, 14 C. C. A. 257, 30 L. R. A. 161; Robertson *v.* Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Wilson *v.* Atlantic, etc, R. Co. (C. C. 1904) 129 Fed. 774, affirmed 133 Fed. 1022, 66 C. C. A. 486; Hutchinson on Carriers (3d Ed.) § 88, p. 84; Moore on Carriers, § 38. The rule rests upon the principle that such loaded cars or vehicles are not such goods as railroads hold themselves out to carry, and in respect to which they assume a public duty to serve all alike who apply for carriage, and such cars being a class of property they do not profess to carry, and the drawing of which is inconsistent with their business, they are therefore exempt from all public duty to haul them. 1 Hutchinson on Carriers (3d Ed.) § 47, and authorities collated; Moore on Carriers, § 1. A common carrier may, however, become a private carrier, and by special agreement undertake for hire to carry that which he is under no obligation to carry. Louisville, etc., Co. *v.* Keefer (1896) 146 Ind. 21, 26, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348, and cases cited; Pittsburgh, etc., Co. *v.* Mahoney (1897) 148 Ind. 196, 200, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503, and cases cited; Hutchinson on Carriers (3d Ed.) § 44. In the latter section the author states: "A common carrier may undoubtedly become a private carrier, or bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and where this is the effect of a special arrangement a carrier is not liable as a common carrier and cannot be proceeded against as such." See, also, Baltimore, etc., R. Co. *v.* Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.[2]

[1] Only an extract from the opinion is here given.— ED.

[2] See Chicago, M. & St. P. Ry. Co. *v.* Wallace (1895), 66 Fed. 506, 30 L. R. A. 161, and note.

"Appellee is a common carrier for hire, and as such is bound, when

ASHURST, J., IN HYDE *v.* TRENT AND MERSEY NAVIGATION CO.

5 Term R. 389. 1793.[1]

THE inclination of my opinion on the general question is that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and would open a door to fraud; for if the liability of the carrier were to cease when he had brought the goods to any inn where he might choose to put up his coach, and a parcel containing plate or jewels, brought by him, were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods; but that does not prove that the carrier is not bound to deliver them, if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier: but it does not apply to other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion.[2]

requested, to receive for transportation over its lines cars of other common carriers, and as to such cars it holds the same relation as to ordinary freight received by it for transportation, and is held to the same measure and character of liability to the owners of the cars, as would attach with respect to any other property received by it for carriage. (Peoria & P. U. Ry. Co. *v.* Chicago R. I. & P. Ry. Co., 109 Ill. 135; East St. Louis C. Ry. Co. *v.* Wabash St. L. & P. Ry. Co, 123 id. 594; Peoria & P. U. Ry. Co. *v.* U. S. R. S. Co., 136 id. 643; Schumacher *v.* Chicago & N. W. Ry. Co., 207 id. 199.)" Pittsburgh C. C. & St. L. Ry. Co. *v.* City of Chicago (1909), 242 Ill. 178, 188. *Accord:* Chicago, B. & Q. R. R. Co. *v.* Curtis (1897), 51 Neb. 442, 453; Mackin *v.* Boston & A. R. Co. (1883), 135 Mass. 201; Hudson V. Ry. Co. *v.* Boston & M. R. R. (1905), 106 App. Div. (N. Y.) 375 (statutory); Baldwin *v.* Chicago R. I. & P. Ry. Co. (1879), 50 Ia. 680 (statutory); Thomas *v.* Missouri P. R. Co. (1892), 18 S. W. (Mo.) 980 (statutory); Michigan C. R. Co. *v.* Smithson (1881), 45 Mich. 212 (statutory); Louisville & N. R. Co. *v.* Boland (1892), 11 So. (Ala.) 667 (statutory). *Contra:* Oregon S. L. & V. N. Ry. Co. *v.* Northern P. R. Co. (1892), 51 Fed. 465, 474; Little Rock & M. R. Co. *v.* St. Louis S. W. R. Co. (1894), 63 Fed. 775; and see Atchison T. & S. F. R. Co. *v.* Denver & N. O. R. Co., *infra*, p. 107.

[1] Only an extract from the opinion of ASHHURST, J., is reprinted.— ED.

[2] "The offer of the defendant presupposes, what is now conceded, and is indeed extremely well settled, that *prima facie* the carrier is under an obligation to deliver the goods, to the consignee personally." Gibson *v.* Culver (1837), 17 Wend. 305, 306. And see Starr *v.* Crowley (1825), 1 McClel. & Young, 129; Fish *v.* Newton (1845), 1 Denio, 45.

"Common carriers are ordinarily bound to carry goods entrusted to their conveyance to the residence or place of business of the consignee; but whether this rule can be conveniently applied to the business usually transacted by canal and railroad may admit of doubt." Eagle *v.* White (1841), 6 Whart. (Pa.) 505, 517.

"*Prima facie*, there must be actual delivery, or in the case of a carrier

BULLARD v. AMERICAN EXPRESS CO.

107 Mich. 695. 1895.[1]

MONTGOMERY, J. This is an action in case, commenced in justice court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses, and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his shipments, and to deliver packages to him, which defendant refused to do; that defendant collects for shipment from and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, conditions, and situation as the plaintiff, and for shippers at a greater distance from its place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff by such refusal; that plaintiff has been damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice court. In the circuit court the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in

by water, a landing at the wharf, or usual landing place, with due and reasonable notice to the consignee of the arrival of the goods. But this rule may be varied by contract, or affected by a well-established, reasonable and generally known custom and usage." Huston *v.* Peters, Hardin & Co. (1858), 1 Metc. (Ky.) 558, 562.

"It is not the customary duty of a railroad company to tender the goods to the consignee, but the goods are kept at the depot or warehouse until the consignee calls for them." Jarrett *v.* Great N. Ry. Co. (1898), 74 Minn. 477, 480.

[1] The statement of facts and arguments of counsel are omitted.— ED.

evidence that the plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, circumstances, conditions, and situation as the plaintiff, and for caused damage to plaintiff.

At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of the custom of receiving goods at other places. Hutch. Carr. §§ 82, 87; Blanchard v. Isaacs, 3 Barb. 388. But it is insisted that the defendant in this case, having practiced the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them.

The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee. Wood's Browne, Carr. § 230; Hutch. Carr. 379. The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that, when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not unreasonable to require the consignee to call at the office. Hutch. Carr. § 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in ap-

parent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with them, having knowledge of this fact, they are not bound to deliver beyond these limits. We do not determine what the right of one not having knowledge of these limits would be. This is not such a case, but in this case we think the court committed no error in directing a verdict for the defendant. Judgment will be affirmed.

McGRATH, C. J., did not sit. LONG, GRANT, and HOOKER, J. J., concurred.

WALWORTH, C., IN VAN SANTVOORD *v.* ST. JOHN.

6 Hill, 157. 1843.[1]

THE evidence shows that the plaintiffs in error were not common carriers between New York and Little Falls, but only common carriers of goods from New York to Albany; and were mere forwarders of such goods by the canal lines when they were directed to places beyond Albany, on the canal route. And St. John & Tousey had no more right to expect that these carriers between New York and Albany would themselves carry the box of clothing in question to Little Falls, than they had to suppose they would deliver the other box, forwarded by their towboat at the same time, to Hubbard at Chicago. As to both, they must have understood and expected that the owners of the tow-boat line would transport the boxes to the place where their business as common carriers terminated, and send them on in the usual way as forwarders, from that place.[2]

PULLMAN PALACE CAR CO. *v.* LAWRENCE.

74 Miss. 782. 1897.

Supra, p. 9.

[1] Only part of CHANCELLOR WALWORTH'S opinion is reprinted.— ED.

[2] "The question whether a railroad company can make a valid contract for the transportation of freight beyond the limits of its own road, as their limits are fixed by its charter, as we understand the decision of the Court of Appeals, in West *v.* The Rensselaer and Saratoga R. R. Co. (4 Seldon, 37), must now be regarded as finally settled. It is only on the supposition that such a contract is valid, that the decision in that case can be explained. It is, therefore, needless to refer to the recent decisions in England, or to prior decisions in our own courts, which countenance, if they do not establish, the same doctrine." Schroeder *v.* Hudson River R. R. Co. (1885), 5 Duer, 55, 61.

ATCHISON, TOPEKA & SANTA FÉ R. R. CO. *v.* DENVER & NEW ORLEANS R. R. CO.

110 U. S. 667. 1884.[1]

It appeared that when the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its truck was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates.

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver & New Orleans Company erected at its junction with the Atchison, Topeka & Santa Fé platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with

[1] The statement of facts is abridged, and parts of the opinion are omitted. —Ed.

any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A. T. & S. F. R. R., or reached by either line; that a system of through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka, & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company.

This bill in equity was brought to compel the Atchison, Topeka & Santa Fé Railroad Company to comply with the terms of the written request served upon it.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. After reciting the facts in the foregoing language he continued:

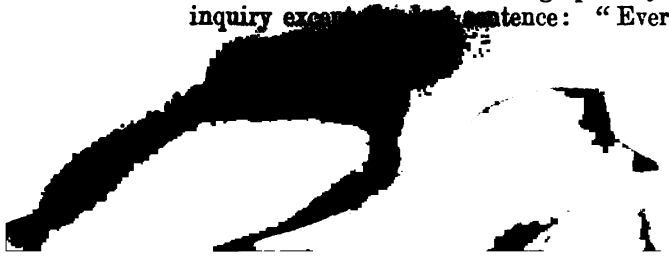
The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligation upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall



have the right with its road to intersect, connect with, or cross any other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver and New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line; and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to wit, the relative rights of the two companies at common law and under the Constitution as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;

2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and

3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor

2. That companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeka & Santa Fé Company just as any other customer does, and with no more rights. It

has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usuage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Den-

ver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.[2]

SARGENT *v.* BOSTON AND LOWELL RAILROAD CORPORATION.

115 Mass. 416. 1874.[1]

WELLS, J. This action is founded upon the supposed obligation of the defendants, as common carriers, to provide facilities

[2] See § 15 of the Interstate Commerce Act, as amended in 1906, Appendix, p. 506.

[1] The statement of facts is omitted, and only part of the opinion is reprinted.— ED.

and accommodations to enable the plaintiff to transact his business as expressman over and upon the railroads of the defendants. For this purpose he requires that his merchandise and parcels shall be transported, not as freight under the general charge and control of the managers and servants of the railroads, but in their passenger trains and under the exclusive control and supervision of the plaintiff and his agents: who also require special accommodations and facilities in the cars and stations of the defendants, for the receipt and distribution of their packages. It is not alleged that there is any contract for such service. The contract which once existed, and the course of business in previous years, are recited for the purpose of showing the manner in which the business of the plaintiff had grown up and the good will connected therewith had been gained, as bearing upon the damages caused by withdrawing from him the means for its further prosecution. The complaint is, that under the guise of a proposal to sell or let the privilege which the plaintiff and his associates had before enjoyed, to be used exclusively by the one party who would pay most for it, the defendants had in fact denied it to all, and assumed the conduct of the business of express carriage and parcel delivery by its own agents and servants.

The allegation of the second count, that the defendants had refused to receive and transport articles of freight for the plaintiff in the usual modes of transportation of freight, is abandoned.

We know of no principle or rule of law which imposes upon a railroad corporation the obligation to perform service in the transportation of freight, otherwise than as a carrier of goods for the owner in accordance with their consignment; or which forbids it from establishing uniform regulations applicable alike to all persons composing the public to whom the service is due. We are pointed to no provision in the charters of these defendants, or in the general laws relating to railroads, which subjects the use of their roads to the convenience or requirements of other carriers than the corporations authorized to construct and operate them, and such other railroads as may have been authorized to enter upon or unite with and use them. Gen. Sts. *c.* 63, § 117.

All the provisions of law for the regulation of railroads contemplate the unlimited exercise by the corporation of the rights and duties of general carriers of goods and passengers; and this involves the right to adopt any and all reasonable rules and regulations to direct the mode in which their business shall be transacted. They cannot be required to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains; nor can they be compelled

to admit others than their own agents and servants upon their trains or to their stations for the custody, care, receipt and delivery of freight or parcels.

Whether the defendants, in establishing and conducting the business of their own "parcel department" undertake to collect and distribute goods and parcels in a manner which involves acts *ultra vires,* does not affect the question; nor, if they do so, does it afford the plaintiff any ground of action. His claim is for their refusal to furnish to him certain claimed facilities upon the roads. That refusal does not involve any acts or exercise of powers *ultra vires.*

Nor does the fact that for many years the defendants did afford certain facilities to separate and independent carriers, as express companies, confer any right upon them or impose any obligation, either of contract or duty, upon the defendants to continue the same unchanged.

Whatever may have been contemplated, when the charters for these roads were granted, as to the parties by whom and the mode in which the tracks would be used for the running of trains or carriages upon them, and the manner in which tolls would be received, it cannot be doubted that since the St. of 1845, *c.* 191, the direction of the use of the roads, and the control of all carriages upon them, are exclusively in the directors of the corporations owning them. It is a franchise of a public nature, it is true; and the directors are bound to conduct its exercise with a view to public convenience. But they, and not the individual members of the public, are intrusted with the discretion, authority and duty, in the first instance, to determine what the public convenience requires. They are subject, in this respect, to the oversight and regulation of the legislature. It is only when they disregard such regulations as are provided by law, or required by a reasonable consideration of the public convenience and the purposes of their charter, that individuals are entitled to complain.[2]

[2] The plaintiff also contended that the refusal to furnish him with the facilities which he desired constituted illegal discrimination. The Court declared that this could not be so when the company was not furnishing any one else with such facilities. The Court concluded that, "All that the plaintiff can demand is that, in each of those branches [of defendant's business], he shall have equal terms with other persons and companies."— ED.

EXPRESS CASES.

117 U. S. 1. 1886.[1]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company.

The report also contains a copy of the contract between Harnden and the New Jersey Steam Navigation Company, the owner of the Lexington, dated the 1st of August, 1839, for the facilities to be afforded Harnden for his business, on the steamers of that company. This contract was similar to one made a short time before with the Boston and New York Transportation Company, a company which became merged in the New Jersey Steam Navigation Company August 1, 1839, and it provided that Harnden, in consideration of $250 per month, was to have the privilege of transporting in the steamers of the company between New York and Providence, via Newport and Stonington, not to exceed once each day from New York and from Providence, "one wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown)." It was also stipulated and agreed that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the said New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers for the loss of any goods, wares, merchandise, notes, bills, evidences of debts, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company." It was also further provided that Harnden should attach to all his advertisements for business, and to his bills of lading, notices in the form of that at the foot of his advertisement, a copy of which is given above, and that he should not violate any of the provisions of the post office laws, or interfere with the Navigation Company in its transportation of letters or papers, or carry powder, matches, or other combustible materials of any kind calculated to endanger the safety of the boats or the property or persons on board. At the end was this clause: "And that this

[1] Parts of the opinions of MR. CHIEF JUSTICE WAITE and of MR. JUSTICE MILLER are omitted.— ED.

contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month's notice given in writing."

Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express mattter." Express companies have undoubtedly invested their capital and built up their business in the

hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted.

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the express man in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a de-

gree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its al-

lotted territory, always extending its lines in the agreed directions as circumstances would permit.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express

company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure

of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in Atchison, Topeka and Santa Fé Railroad Co. *v.* Denver & New Orleans Railroad Co., 110 U. S. 667, followed at this term in Pullman's Palace Car Co. *v.* Missouri Pacific Railway Co., 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MR. JUSTICE MILLER dissenting.

I only desire to add one or two observations in regard to matters found in the opinion of this court.

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character, and not judicial.

As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then in the absence of any legislative rule fixing their compensation I maintain that that compensation is a judicial question.

It is, then, the ordinary and ever-recurring question on a *quantum*

meruit. The railroad company renders the service which, by the law of its organization, it is bound to render. The express company refuses to pay for this the price which the railroad company demands, because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt.

That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it, when it becomes matter of controversy.

The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced, no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half century ago, before Harnden established his local express between the large Atlantic cities; for, let it be remembered, that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances.

I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

MR. JUSTICE FIELD dissenting.

I agree with MR. JUSTICE MILLER in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

MR. JUSTICE MATTHEWS took no part in the decision of these cases.

STATE *v.* REED.

76 Miss. 211. 1898.[1]

WOODS, C. J. Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railroad Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was by the judgment of that court acquitted of the charge and discharged. From this judgment of the circuit court, the state prosecutes this appeal.

The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. Says the agreed statement: "It is contended that the said company had the right to make the said contract, and thus exclude the defendant and others than the said Peine from the said inclosure, and to grant to the said Peine the exclusive right to enter the said inclosure for the purpose of there soliciting passengers for his hack line. Defendant controverts this position, in so far as it is claimed that the said company can grant the exclusive right to any particular person to enter the said inclosure with his hack, and there solicit passengers, and contends that the railway company must exclude all or admit all into the said inclosure, so long as they conduct themselves in an orderly and peaceable manner."

The single issue thus sharply defined, viz: Has a railway the right to confer upon one hackman the exclusive privilege of entering with his hacks its inclosed stationhouse grounds, and of soliciting incoming passengers, and to exclude all others from the inclosure, such privilege conferring advantages upon the favored hackman, and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded 150 feet from the depot, and in an open street? The question has never before been presented in our courts, but it is by no means a new one, and has been passed upon in other jurisdictions.

Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds, yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchan-

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

dise, and at the same time exclude all others. The question is one that affects not only the excluded hackmen; it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between the rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railway in the present case would be, in effect, to confer upon the railway company the control of the transportation of passengers beyond its own lines, and in the end to create a monopoly of such business, not granted by its charter, and against the interests of the public. These are the views ably urged in Kalamazoo Hack Co. *v.* Sootsma, 84. Mich. 194; Montana Union Railway Co. *v.* Langlois, 9 Mont. 419; Cravens *v.* Rodgers, 101 Mo. 247; and McConnell *v.* Pedigo, 92 Ky. 465. These are the views held, too, by the three dissenting judges in the case of Old Colony Railroad Co. *v.* Tripp, 147 Mass. 35–41. The majority of the judges in that case held that a railroad might grant to one an exclusive right to solicit the patronage of incoming passengers; but this is the only American case making that distinct holding, and that opinion was delivered by four judges, the other three members of the court vigorously dissenting, and with better show of reasoning, in our judgment. The cases of Barney *v.* Oyster Bay and Huntington Steamboat Co., 67 N. Y. 31, Fluker *v.* Georgia Railroad & Banking Co., 81 Ga. 461, and Cole v. Rowen, 88 Mich. 219, do not present the precise point involved in the case before us. They are all decisions of other questions, and can be readily distinguished from the case in hand.

Counsel for appellant think that in Cole *v.* Rowen, 88 Mich. 219, the supreme court of Michigan has swung away from the doctrine announced in the earlier case of Kalamazoo Hack Co. *v.* Sootsma, 84 Mich. 194. But that very able court did not so think, and was careful to disabuse the mind of counsel, who seems to have the notion which counsel here puts forward, and the court clearly distinguished the two cases.

We are of opinion that the railroad had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.

DONOVAN *v.* PENNSYLVANIA CO.

199 U. S. 279. 1905.[1]

MR. JUSTICE HARLAN delivered the opinion of the court.

Upon the pleadings two principal inquiries arise: First, whether the Pennsylvania Company, having made an arrangement with the Parmelee Transfer Company to furnish, at its passenger station, from time to time, all vehicles necessary for the accommodation of passengers arriving there on its trains or on the trains of other railroad companies, may legally exclude from its depot grounds or passenger station all hackmen or expressmen coming to either *for the purpose only* of soliciting for themselves the custom or patronage of passengers.

Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right — if it was not its legal duty — to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end — primarily, as we may assume from the record — that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger, upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary.

Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses,— certainly, at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling. The defendants did not have, or profess to have, any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the state, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by

the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company, by such use of its property, also derived pecuniary profit for itself, that was a matter of no concern to the defendants, and gave them no ground of complaint.

In the Express Cases, 117 U. S. 1, 24, which involved a general inquiry as to the respective rights of railroad and express companies in respect of the use of railroads for the transportation of express parcels, this court said: "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

In Chicago, St. L. & N. O. R. Co. *v.* Pullman Southern Car Co. 139 U. S. 79, 89, one of the questions was as to the validity of a contract between a railroad company and the Pullman Company, whereby the latter was given the exclusive right for fifteen years to furnish drawing-room and sleeping cars to be used by the former, and whereby, also, the railroad company stipulated that during that term it would not contract to give a like privilege to other sleeping car companies. That contract was assailed as one in restraint of trade and as being against public policy. This court said: "The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty as a carrier of passengers was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter

of indifference to the public who owned them. Express Cases, 117 U. S. 1."

The views we have expressed find more or less support in numerous adjudged cases, some of which are cited in the margin.[2] There are cases to the contrary, but, in our opinion, the better view, the one sustained by the clear weight of authority and by sound reason and public policy, is that which we have expressed.[3]

[2] Jencks *v.* Coleman, 2 Sumn. 221; The D. R. Martin, 11 Blatchf. 233; Com. *v.* Power, 7 Met. 596; Barney *v.* Oyster Bay S. B. Co., 67 N. Y. 301; Old Colony R. Co. *v.* Tripp, 147 Mass. 35; Com. *v.* Carey, 147 Mass. 40; State *ex rel.* Sheets *v.* Union Depot Co., 71 Ohio St. 379; Norfolk & W. R. Co. *v.* Old Dominion Baggage Co., 99 Va. 111; Fluker *v.* Georgia Railroad Co., 81 Ga. 461; Griswold *v.* Webb, 16 R. I. 649; Summitt *v.* State, 76 Tenn. 413; New York &c. R. R. Co. *v.* Scovill, 71 Conn. 136; Kates *v.* Cab Co., 107 Ga. 636; Godbout *v.* St. Paul Union Depot, 79 Minn. 188; Boston & Albany R. R. Co. *v.* Brown, 177 Mass. 65; Boston & Maine R. R. Co. *v.* Sullivan, 177 Mass. 230; New York &c. R. R. Co. *v.* Bork, 23 R. I. 218; St. Louis Drayage Co. *v.* Louisville, &c.. R. R. Co., 65 Fed. Rep. 39; Hedding *v.* Gallagher, 72 N. H. 377.

[3] Compare the following cases: Barker *v.* Midland Ry. Co. (1856), 18 C. B. 46, in which plaintiff brought action for damages for exclusion from defendant's premises, when desiring to enter with his omnibus for the purpose of setting down passengers and goods, and for the purpose of taking up passengers who had previously engaged him, other omnibus drivers being allowed to enter for such purposes. One count was based upon the Railway and Canal Traffic Act, 1854, which requires that all reasonable facilities shall be afforded for receiving and delivering traffic, and forbids any undue preference to any particular person or company, or any particular description of traffic in any respect whatever. Judgment was rendered for defendants. CROWDER, J., said: "This is not an action brought by a person wishing to travel by the defendant's railway or to send goods by it; but by a person who carries to and from the railway persons who are desirous of using or who have used the railway. He clearly is not a person who can complain of an obstruction. As to the fourth count, the Railway and Canal Traffic Act, 1854, is confined to the affording facilities to persons using or desiring to use a railway or canal. If any obstruction be afforded in such a case, the party may avail himself of the remedy provided by the act." The above case was quoted and approved in the House of Lords in Perth General Station Committee *v.* Ross [1897] A. C. 479, 493.

In re Marriott (1857), 1 C. B. (N. S.) 499, in which an injunction was sought under the Railway and Canal Traffic Act, 1854, directing the London and South Western Ry. Co. to admit Marriott's omnibus into the station yard for the purpose of delivering and receiving traffic. It appeared that other omnibuses were allowed to enter the yard for such purposes, and that passengers coming and leaving by Marriott's omnibus were greatly inconvenienced. Marriott's omnibus went to certain outlying towns not served by the omnibuses admitted to the station yard. The injunction was granted. CROWDER, J., said: "I also am of the opinion that this rule should be made absolute to the extent stated by the Lord Chief Justice, on the ground that the company, by the course of conduct pursued by them toward the complainant, have subjected him and his passengers to a greater degree of inconvenience than the passengers by Williams's omnibus have been subjected to. For instance, all passengers who come from Teddington and Hampton Wick by the complainant's omnibus are subjected to the inconvenience of being set down at the gate of the station yard, whereas Williams's coming from Kensington and Norbiton are allowed to be driven into the yard and up to the door of the booking-office. That is clearly giving the one set of passengers an undue and unreasonable preference and advantage over the others, and constitutes one of those cases in which the legislature has by the recent statute authorized us to interfere." By *In re* Beadell (1857), 2 C. B. (N. S.) 509, the authority of *In re* Marriott, is restricted to cases where the exclusion of the omnibus owner or hackman has been injurious to patrons of the road.

Griswold *v.* Webb (1889), 16 R. I. 649, where a hack driver, having been

WESTERN UNION TELEGRAPH CO. *v.* SIMMONS.

93 S. W. (Tex. Civ. App.) 686. 1906.[1]

THIS was an action for damages for refusal to receive and transmit a message destined for a point on the line of another telegraph company.

FLY, J. Telegraph companies are public agencies, chartered for public purposes, and vested with the right of eminent domain in the condemnation of private property for their use. With the grant of these powers and privileges there goes the duty, for a reasonable consideration, to receive and transmit all messages over their lines with promptness, skill and despatch. Joyce, Elec. Law, sec. 14, and authorities noted. The law relating to the receiving and forwarding of telegraphic messages to connecting lines is so nearly analogous to that in regard to common carriers that the established rules of law that determine the liability of the common carrier apply with equal force to telegraph companies. Each can restrict its liability to its own line, but each must receive and forward with diligence to the connecting line, and each will be held liable for its failure or refusal to perform that duty. Smith *v.* Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

ALBANY TELEPHONE CO. *v.* TERRY.

127 S. W. (Tex. Civ. App.) 567. 1910.

SPEER, J. J. B. Terry, as plaintiff below, filed this suit against the Albany Telephone Company and the Southwestern Telegraph

engaged to call for an incoming passenger, went upon a part of the railroad premises reserved for private carriages, although forbidden to do so, and was sued in trespass. The Court said in part: "The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of the carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. . . . We think the justification [of defendant] is sufficient. . . . It simply secures to a passenger the common privileges of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting *bona fide* as a servant of such passenger. This qualification guards the owner from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit." Judgment for defendant.

[1] The statement of facts is abridged, and only an extract from the opinion is reprinted.— ED.

& Telephone Company, seeking to recover damages for the negligent failure of those companies in respect to three certain telephone calls, tendered to them about August 2, 1907, relative to the serious illness of his brother, Martin Terry, at Clarksville. The trial resulted in a verdict and judgment in plaintiff's favor for $500, and the defendants have appealed.

The undisputed facts, which are decisive of this appeal, show that the first call involved was put in by Mrs. Butler, a sister of appellee, at Clarksville, about 5 o'clock A. M., August 2d, to the Southwestern Telegraph & Telephone Company, whose line extends from Clarksville to Cisco, at which latter place the call was delivered to the Albany Telephone Company, whose line extends from Cisco to Stamford and Rotan. The Albany Telephone Company received the call and made every effort to find appellee at Stamford, to which place the call was addressed; but he was not to be found there, having departed the day before for Rotan. The Southwestern Telegraph & Telephone Company had an arrangement with the Albany Telephone Company whereby the two companies would handle calls for Stamford, but not for Rotan. Appellee in some way learned that he was wanted at Clarksville, and, knowing of his brother's illness, attempted to call up Dr. Dinwiddie at that place from Rotan over the lines of these appellants. The evidence further shows that on about August 6th one W. H. Le Master, at Clarksville, put in a call for appellee at Rotan; but such call was refused, for the reason already given. Neither of the appellants offered to handle calls for the public between the stations of Clarksville and Rotan. Appellee at no time after the first call by his sister, Mrs. Butler, was at Stamford. Under these facts, the trial court should have given the requested instructions for the appellants. There is absolutely nothing in the facts to show that any duty was imposed by law or contract on the appellants, or either of them, to afford the means of telephonic communication between appellee at Rotan and any of the other parties at Clarksville.

The judgment is therefore reversed, and here rendered for appellants.[1]

[1] In Billings Mut. Tel. Co. *v.* Rocky Mountain Tel. Co. (1907), 155 Fed. 207, statutory provisions which allowed one telephone company, by means of eminent domain, to compel a connection with, and a user of the lines of another telephone company, were upheld and enforced.

STATE *ex rel.* THE AMERICAN UNION TELEGRAPH CO. *v.* THE BELL TELEPHONE CO.

36 Ohio State, 296. 1880.[1]

THE Columbus Telephone Company is engaged in doing a general telephone business in the city of Columbus. The telephone instruments used by it are the property of the American Bell Telephone Company, a Massachusetts corporation, which company owns the letters patent on such instruments. By the contract between the Columbus Telephone Company and the Bell Telephone Company it is provided that no telegraph company, unless given special permission by the Bell Telephone Company, can be a subscriber to the service of the Columbus Telephone Company, or use the system to collect and deliver messages from and to its customers. The Bell Telephone Company has contracted with the Western Union Telegraph Company to give the latter company the exclusive right to use the system of the Columbus Telephone Company for the purpose of collecting and distributing telegraphic messages. The relators demanded similar service, but were refused, and therefore brought this action for a writ of mandamus, directing the Columbus Telephone Company to furnish the service desired.

MCILVAINE, C. J. Whether any such duty, upon the principles of the common law, is owing from respondents or either of them to the relators as members of the general public, as is claimed by them, growing out of the nature of the business in which respondents are engaged and their relations to the public generally, we need not stop to inquire, as, in our opinion, the whole question between the parties may be determined by the provisions of the statute in such case made and provided.

Title 2, chapter 4 of the revised statutes of Ohio, from section 3454 to section 3470, prescribes the powers and duties of magnetic telegraph companies, and section 3471 of the same chapter provides, "the provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Among the powers conferred upon magnetic telegraph companies is the right to occupy public roads and other public grounds,

[1] Only a summary of the facts is given, and the arguments of counsel, as well as one paragraph of the opinion, are omitted.— ED.

and the power of eminent domain, and among their duties are the following, as prescribed in section 3462, as amended April 15, 1880, namely: "Every company, incorporated or unincorporated, operating a telegraph line in this state, shall receive dispatches from and for other telegraph lines, and from and for any individual; and on payment of its usual charges for transmitting dispatches, as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect or refusal to do so, to be recovered with costs of suit by civil action, in the usual name, and for the benefit of the person or company sending or forwarding, or desiring to send or forward the dispatch."

This section, when construed in connection with section 3471, above quoted, makes it the duty of the Columbus Telephone Company to receive dispatches from and for telegraph lines, by the very words of the statute; but if not, such duty towards the relators and each of them is embraced in the succeeding clause, "and from or for any individual." The word "individual" is here used in the sense of person, and embraces artificial or corporate persons as well as natural. The dispatches so received "from or for," must be transmitted "with impartiality," that is, without discrimination, either in respect to persons or in the time or manner of transmission.

Such being the nature of the duty imposed upon the Columbus Telephone Company by the statute, it cannot shield itself from the performance thereof, by any self-imposed restrictions contained in the stipulations of a contract with the American Bell Telephone Company, by which the right to use the instruments or license of the latter company was acquired. The Columbus Telephone Company was bound to acquire from the American Bell Telephone Company, such rights in its instruments and patent (or to provide itself by other means of all such facilities), as were necessary to discharge its duties to the public, as prescribed in the statute; otherwise, it had no right to engage in the business of operating a system of telephones at all.

We do not mean to say, that as between the Columbus Telephone Company and the American Bell Telephone Company, the right to control the receipt and delivery of telegraph messages might not have been reserved to the latter company; but we do hold, that no such right could be reserved whereby the relators could be deprived of the use of the system of telephones organized and managed by these telephone companies, either jointly or severally.

And in regard to the American Bell Telephone Company, it is enough to say, after what has already been said in relation to the

Columbus Telephone Company, that it cannot be permitted to operate a line or system of telephones, in this state, and in the face of the statute, either directly, or through the agency of licensees, without impartiality, or in other words, with discriminations against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers, who are in like circumstances. And all contracts in contravention of the public policy of this state, as declared in chapter 4 of the revised statutes, above referred to, must be declared void and of no effect.

It is claimed that the statute above referred to cannot control or invalidate the contract in question, because the exclusive right to make, vend, and use these telephone instruments is vested by the assignment of letters patent, under an act of congress, in the American Bell Telephone Company; and that it is not within the power of a state to impair the right so secured. In our opinion, this statute is not the subject of constitutional infirmity.

While it is true, that letters patent secure a monopoly in the thing patented, so that the right to make, vend, or use the same is vested exclusively in the patentee, his heirs and assigns, for a limited period; it is not true, that a right to make, vend, or use the same in a manner which would be unlawful except for the letters patent, thereby becomes lawful, under the act of congress, and beyond the power of the states to regulate or control.

This doctrine is fully discussed and settled in Jordan *v.* Overseers of Dayton (4 Ohio, 295), and Patterson *v.* Kentucky (97 U. S. 501). The doctrine of these cases may be stated thus: the right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation, simply because the patentee acquires a monopoly in his discovery. "The sole operation of the statute is to enable him to prevent others from using the products of his labors without his consent; but his own right of using is not enlarged or affected." The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by state laws when the public welfare requires it.

It appears to us, as a proposition too plain to admit of argument, that where the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the state may impose such condi-

tions and regulations as in the judgment of the law-making power are necessary to promote the public good.

As respects the Western Union Telegraph Company we are of opinion that no case has been made which will justify a judgment against it; but as to the respondents, the Columbus Telephone Company and the Bell Telephone Company, the writ of mandamus prayed for should be made peremptory.

Judgment accordingly.[2]

NAIRIN *v.* KENTUCKY HEATING CO.

27 Ky. Law Reporter, 551. 1900.[1]

ACTION by Robert Nairin against the Kentucky Heating Company for an injunction restraining defendant from turning off plaintiff's supply of gas. On an application for dissolution of the injunction. Application granted.

DU RELLE, J. It will be observed that the only grounds urged in the pleadings in this case for relief by injunction are, stated briefly, the facts that the defendant had natural gas which it was furnishing for heating purposes, and that plaintiff desired the gas for lighting purposes; that defendant had been restrained from furnishing gas for lighting, but that plaintiff was not a party to the proceeding; and that, while defendant was forbidden by the ordinance under which it was permitted to do business to sell gas for lighting purposes, the city which passed the ordinance was not complaining. It might be sufficient to stop here and say that here is no ground stated for relief by injunction. No contract is averred, a violation of which is sought to be prevented — no suggestion of a contract, except the averment that plaintiff applied for a gas connection and got it. There is not even an averment that he made application for a gas connection for lighting purposes. Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain Peaslee, Gaulbert & Co. from refusing to vend oil to him. But the petition on its face shows that, as to the sale of gas for lighting purposes, the defendant was not only not exercising a public franchise, but was, by the ordinance which

[2] See in accord, Commercial Un. Tel. Co. *v.* New England T. & T. Co. (1888), 61 Vt. 241; Chesapeake & P. Tel. Co. *v.* Baltimore & O. Tel. Co. (1887), 66 Md. 399. But see *contra*, American Rapid Tel. Co. *v.* Connecticut Tel. Co. (1881), 49 Conn. 352; People *ex rel.* Postal T. C. Co. *v.* Hudson River Tel. Co. (1887), 19 Abbott's New Cases (N. Y.), 466.

[1] Only an extract from the opinion is reprinted.— ED.

permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other than heating purposes. The plaintiff is therefore in the position of asking an injunction requiring the defendant to violate an ordinance of the city.[2]

Section 2.

Who Must Be Served and Excuses for Failure to Serve.

KISTEN *v.* HILDEBRAND.

9 B. Monroe, 72. 1848.[1]

Chief Justice Marshall delivered the opinion of the court.

It was laid down in Colyer's case (8 Coke, 32) that common inns were instituted for passengers and wayfaring men. And we think it will be found that the great liability imposed upon them, is for the benefit of travellers and transient persons, who are often compelled to resort to inns for shelter and entertainment, without the means of knowing the character of the host; and without the opportunity of securing themselves against loss or damage to their goods. A common innkeeper is defined to be "a person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants:" (Bacon's Ab. Inns and Innkeepers, B.; Story on Bailments, Sec. 475). But it has been decided that a man may be an innkeeper, and liable as such, though he have no provision for horses. It is not necessary that he should have a sign indicating that he is an innkeeper, but it must be his business to entertain travellers and passengers.

His duty extends chiefly to the entertaining and harboring of travellers, &c., and therefore, if one who keeps a common inn refuses to receive a traveller, or to find him in victuals, &c., for a reasonable price, (without good excuse, as that his house is full,) he is liable not only to a civil action, but to an indictment. For having taken upon himself a public employment, he must serve the public to the extent of that employment: (Bacon's Ab. Inns and Innkeepers, C. 1.)[2]

[2] See People *ex rel.* City of Los Angeles *v.* Los Angeles Indep. Gas Co. (1907), 150 Calif. 557.

[1] Only an extract from the opinion is reprinted.— Ed.

[2] "The words [of the writ] are *ad hospitandos homines per partes ubi hujismodi hospitia existunt transeuntes, et in eisdem hospitantes;* by which

BROWN *v.* BRANDT.

[1902] 1 K. B. 696.[1]

DARLING J. I am of the same opinion. No doubt an innkeeper is bound to provide accommodation for travellers, but he is not bound to do so at all risks and all costs. He is only bound to provide accommodation so long as his house is not full; when it is full he has no duty in that respect. The question then arises, when an innkeeper's house may properly be said to be full. I do not think that the old cases can help one very much, because in olden times people were in the habit of sleeping many in one room, and several in one bed. People who were absolutely unknown to each other would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of "full" in one of the old cases, I should not be surprised to find that what was called "full" then we should now call "indecent overcrowding." It is the habit now of people to occupy separate bedrooms, and, having regard to the ordinary way of living at the present time, I think an inn may be said to be full for the purpose of affording accommodation for the night if all the bedrooms are occupied. There might have

it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is, *diversorium*, because he who lodges there is, *quasi divertens se a via;* and so *diversoriolum*. And therefore if a neighbor who is no traveller, as a friend, at the request of the innholder lodges there and his goods be stolen, etc., he shall not have an action; for the writ is, *ad hospitandos homines*, etc., *transeuntes in eisdem hospitantes*, etc." Calye's Case (1584), 8 Co. Rep. 32b. "The defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the smallpox; and it was quashed for not saying he was a traveller." King *v.* Luellin (1703), 12 Mod. 445. See also Curtis *v.* Murphy (1885), 63 Wis. 4.

"A man may keep an inn for those persons only who come in their own carriages." Johnson *v.* Midland Ry. (1849), 4 Exch. 367, 371. "Guests of a hotel, and travellers and other persons entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out by force, after entrance, . . . unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house." State *v.* Steele (1890), 106 N. C. 766, 782. In the following jurisdictions refusal on the part of an innkeeper to serve on account of race or color is forbidden by statute: California, Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Pennsylvania, Vermont and the United States possessions. In the following States refusal to serve "without just cause" is forbidden by statute: Montana, Porto Rico and Utah. In Delaware and Tennessee innkeepers are by statute permitted to serve those whom they please. See the statutory provisions collected in the Appendix to Beale on Innkeepers, and also Revised Laws of Louisiana, § 456.— ED.

See also Nelson *v.* Boldt (1910), 180 Fed. 779.

[1] The statement of facts, arguments of counsel and the opinion of LORD ALVERSTONE, C. J., are omitted.— ED.

been a difficulty here if the plaintiff had said, "I will take your sitting-room. I do not want to go to bed. I will sit up all night." But that difficulty does not arise on the facts of this case. The county court judge has found that the house was full having regard to modern ways of living. He referred to Chaucer and the Canterbury pilgrims. One need only look at the Sentimental Journey to see how people's habits have altered since the time of Laurence Sterne. I am of opinion that the county court judge's decision was right.

REX *v.* IVENS.

7 Car. & P. 213. 1835.

Supra, p. 4.[1]

STATE *v* GOSS.

59 Vt. 266. 1886.[1]

ROWELL, J. This is a complaint in one count for selling, furnishing, and giving away intoxicating liquor contrary to law.

The facts are these. In the summer of 1883, one Pearson, who lived at East Barnet, ordered some lager beer from Bellows Falls, to be sent to him by express, and it came in a box directed to him and marked C. O. D. The respondent was station agent, and also agent of the express company, at East Barnet, and as such express agent delivered said box and its contents to Pearson, and received from him the designated price of $1.75 for transmission to the consignor. The respondent had no knowledge of what the box contained; but the State claimed that from the form and size of the box, and the price paid, he had reason to suspect that

[1] See also Goodenow *v.* Travis (1808), 3 Johns. (N. Y.) 427; Markham *v.* Brown (1837), 8 N. H. 523; State *v.* Steele, note 2 to the last case.

The unconventional dress of one desiring entertainment is no justification for refusal, if such dress is not indecent. Regina *v.* Sprague (1899), 63 J. P. (Eng.) 233.

One who insists on bringing a large dog with him into the inn may be refused entertainment. Regina *v.* Rymer (1877), 2 Q. B. D. 136.

As to the right of an innkeeper to eject one who has been received as a guest, on the ground that the guest has become intoxicated, or has developed a contagious disease, see McHugh *v.* Schlosser (1894), 159 Pa. 480. As to the right of an innkeeper to eject a guest who is no longer a traveller, see Lamond *v.* Richard [1897], 1 Q. B. 541.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

it contained lager beer, and that he could have found out by opening the box.[2]

But do the circumstances shield the respondent? He says they do, because he says it was his duty to deliver the packages as he did, even though he had known their contents, and that he should have been liable had he not delivered them; while, on the other hand, it is said that he was bound to know their contents at his peril, and that his want of knowledge makes no difference.

Both of these propositions are untenable. As to the first, although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor nor other commodities if thereby they would commit an offense or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State.

As to the other proposition, express carriers are not bound, as a general thing, to know the contents of packages offered to them for carriage. If they were, it would follow that they might refuse to carry without such knowledge; and as it would be unreasonable to require them to accept as conclusive the word of the shipper as to contents, they must have a right to inspect for themselves as a condition of carrying, which would occasion great inconvenience in practice. But no such rights exist as a general rule.

This precise question was passed upon by the Supreme Court of the United States in the Nitro-Glycerine Case, 15 Wall, 524, where the rule is laid down thus:

"It not, then, being his [the carrier's] duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicion as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged, as matter of law, with notice of the properties and character of packages thus received."[3]

[2] The court first decided that a servant of a carrier who delivers intoxicating liquors sold contrary to law may properly be indicted for selling, furnishing and giving away such liquor.— Ed.

[3] "The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them. 1. That the person offering the goods has authority to do so. . . . In an action brought against a carrier for refusing to receive and carry goods, would it not constitute a valid defense that the plaintiff had stolen them, although at the time of offering, the carrier may not have known they had been stolen? . . . It is clear that he would be justified in refusing to receive them from one having a wrongful possession, although at the time of such refusal, he might not know the manner in which they had been obtained." Fitch *v.* Newberry (1843), 1 Doug. (Mich.) 1, 10.

EAST KENTUCKY RAILWAY CO. *v.* HOLDBROOK.

4 Ky. Law Reporter, 730. 1883.

APPEAL from Greenup Circuit Court. Opinion of the court by Judge Richards, affirming.

1. Petition upon attachment.— When an officer, in whose hands an attachment is placed, levies upon personal property and places it in charge of a special bailiff, it is a good levy, although his return upon the writ only shows that he "levied" upon the property, describing it, without showing the manner of taking possession.

2. A common carrier of freight has a lien upon each shipment so long as it remains in its possession for the charges thereon, but it cannot refuse to receive freight because back charges for other shipments have not been paid; nor can it by mere notice to the shipper, acquire a lien upon a shipment about to be made, for such back charges.[1]

MURPHY HARDWARE CO. *v.* SOUTHERN RAILWAY CO.

150 N. C. 703. 1909.[1]

BROWN, J. The statute which imposes the penalty sued for is section 2631 of the Revisal of 1905, and reads as follows: "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded

[1] See Atwater *v.* Del., L. & W. R. R. Co. (1886), 48 N. J. L. 55.
As to the right of a common carrier to demand prepayment, see Galena & Chic. Un. R. R. Co. *v.* Rae (1857), 18 Ill. 488; Knight *v.* Providence & W. R. R. Co. (1882), 13 R. I. 572. In an action against a carrier for refusal to carry, the plaintiff need not plead payment or a tender of payment, but it is sufficient if he pleads a readiness and willingness to pay. Pickford *v.* Grand Junction Ry. Co. (1841), 8 M. & W. 372; Clev. C. C. & St. L. Ry. Co. *v.* Perishow (1895), 61 Ill. App. 179. Slight evidence will raise a presumption of such readiness and willingness. Galena & Chic. Un. R. R. Co. *v.* Rea, *supra*.

[1] Part of the opinion is omitted.— ED.

car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at nearest regular station at which there is an agent that such car is loaded and ready for shipment."

In its answer the defendant avers that it was prevented from furnishing cattle cars to the plaintiff on account of a strike of the machinists on its road, numbering some 2,000 or 3,000, which strike it could not control, in consequence of which a large pèr cent. of defendant's motive power got out of order and could not be used.

The decision of the court is put upon the ground that the action is brought to recover a penalty for not receiving the cattle, and not for a failure to transport, and that therefore the defense pleaded cannot avail the defendant, even if true.

We are advertent to the general rule that the carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee. Covington Stock Yard *v.* Keith, 139 U. S. 133. But we think that general rules must sometimes give way to particular cases, and that, if the defense set up be true, the defendant could not be compelled to receive cattle and feed them indefinitely when it was impossible to foresee when they could be shipped. Otherwise, at a cattle shipping point like Murphy, the carrier might, in cases of a breakdown or burning of its bridges, or a long-continued strike of its employés, find itself in a short while with hundreds of cattle on hand which it must feed and care for. No reasonable foresight and judgment can provide against such contingencies.

But that is not the only reason why this defense should be allowed. The penalty statutes must be taken together so as to ascertain the entire burden imposed on the carrier. In case the defendant had received these cattle in its then unavoidably crippled condition, it would have incurred very shortly thereafter another penalty for delay in shipping, for section 2632, immediately following, imposes a penalty for failure to transport within a reasonable time, and fixes the limit of time within which to start the shipment from the initial point at two days. So it follows that, if defendant had received the cattle and penned them, its inability to ship them within two days would have brought upon it another and continuing penalty for 30 days. Bagg *v.* Wilmington, C. & A. R. Co., 109 N. C. 279. As between these two statutes, and in the crippled condition it could not provide against, the defendant would be placed in a helpless condition. It seems unreasonable to require a carrier to continue to receive such a commodity as live stock, especially when conditions it cannot control or avoid will prevent their shipment within the time required by law.

For these reasons we think that a statute which imposed such penalties, and which permitted no defense and no excuse however just, practically takes the property of the carrier without due process of law, because, while the carrier may be brought into court, it is denied the right to make defense or excuse, however reasonable; but we do not so construe the law.

We have considered this question at length in the case of Garrison *v.* Railroad, *anti,* 575, at this term, in a well-considered opinion by Mr. Justice Connor, and have held that these penalty statutes are enacted in aid of the common law and to compel a discharge of those duties only which the common law itself imposes upon the carrier, and that, where the carrier has a legal defense or excuse for failure to discharge such duty, it may be pleaded in an action to recover the penalty.

Upon the principles laid down in that opinion, we think his honor erred in holding that the statute admitted of no defense.

In this view of the case, we deem it unnecessary now to consider the other question of interstate commerc presented on the record.

New trial.[2]

DERBY *v.* LOWRY.

6 Philadelphia, 30. 1865.[1]

ALLISON, J. then charged the jury as follows:

The important question involved in this action is the right claimed by conductors of city passenger railways to refuse passage to persons of color, and to eject such persons from the cars of which they have charge, when entrance to the same is obtained without their knowledge or consent.

The true principle is that a corporation created for the carriage of passengers has no right to exclude any class of persons, as a class, from the benefits of its mode of transportation; it may *for cause* either by or without a regulation exclude individuals. A corporation of this description might as well undertake to make

[2] See note in 22 L. R. A. (N. S.) 1200. Compare Pittsburgh, C. & St. L. Ry. Co. *v.* Hollowell (1879), 65 Ind. 188; Blackstone *v.* Railroad Co. (1859), 20 N. Y. 48.

Refusal to serve when the railroad was under military control. Phelps *v.* Illinois Cent. R. R. Co. (1880), 94 Ind. 548. Refusal to carry plaintiff's coal on the ground that it was of inferior quality, and so would injure the reputation of coal carried by defendant, and injure defendant's coal carrying business. Olanta Coal M. Co. *v.* Beech Creek R. R. Co. (1906), 144 Fed. 150. Refusal to carry unless plaintiff would enter into contract limiting defendant's liability. McMillan *v.* Michigan S. & N. I. R. R. Co. (1867), 16 Mich. 79.

[1] The statement of facts and part of the opinion are omitted.— ED.

nationality or religion a ground of exclusion, as color; it would not be difficult to determine in advance the legal force of a by-law excluding all Germans, or Frenchmen, or Irishmen, or Protestants or Catholics, Jews or Greeks, as such, from the passenger cars of the city; such an exclusion would not be tolerated by any intelligent tribunal; and yet in this, the day of our comparative enlightenment and freedom from a prejudice, to which we were so long in bondage, a question can be seriously made before a court and jury and practically enforced at the bar of public opinion, as to the right of an individual conductor, or a company, to turn persons out of the passenger cars of the city with force and violence because of their complexion. Than this, nothing can be more unreasonable; nothing, in my opinion, is a clearer or grosser violation of the plainest principles of the law and of the rights of individuals.

But, it is asked, are these corporations powerless to protect themselves or the passengers whom they carry? By no means, they have a perfect right to exclude any one not a fit person to ride in their cars. Intoxication, profane or indecent language; the presence of one afflicted with an offensive or contagious disease, smoking in the cars, are but illustrations of the principle, because these are a reasonable offence to the travelling public; these of themselves constitute a ground for exclusion or removal; but the mere prejudice of one class against another cannot be allowed to subvert or overthrow the cardinal doctrine of the equality of all before the law, in the maintenance of the sacred rights of person and of citizenship.

The argument which is used as a justification for the exclusion of people of color from the cars, would shut them out from and bar against them our courts of justice, forbid to them the use of public ferries, bridges and highways, and rests not upon any principle of legal or moral right, but upon bald, naked prejudice alone. It is our duty, gentlemen, in the discharge of our duties, you in your sphere and I in mine, to cast aside all prejudice, that the law may vindicate its just claim to strict and impartial justice. And if, by the action of courts and juries, wrong has been done to the class of citizens to which the plaintiff belongs, it is time that such errors should be corrected.

That the jury, for a wrong like that complained of by the plaintiff, may go beyond mere compensatory damages, and may give vindictive damages, by way of punishment. Verdict for plaintiff. Fifty dollars damages.

FORD *v.* EAST LOUISIANA RAILROAD CO.

110 La. 414. 1903.[1]

PLAINTIFF was a porter on a railroad which had through excursion arrangements with defendant, and plaintiff was for several years allowed to ride free over defendant's line from the point of connection of the two roads to Covington, where plaintiff lived. On one occasion plaintiff was ordered off of one of defendant's trains by defendant's superintendent, on the ground that plaintiff had been engaged from time to time in buying and selling unused parts of excursion tickets over defendant's road. Plaintiff offered to pay his fare but this offer was refused.

BLANCHARD, J. Here he was neither asked for a ticket, nor for payment of the fare in money.

Even if shown that he had been trafficking in the unused portions of excursion tickets, the company could not, because of that, have denied him the right to travel as a passenger on its trains, provided he paid the fare.

It could, of course, at its pleasure, have withdrawn, with or without cause shown, the permission given him to ride free, and it could have resorted to any of the means provided by the law to prevent the practice of buying and selling tickets and protect its rights from that kind of invasion.

But a man who "scalps" railroad tickets cannot, generally, be denied transportation over the lines of the railways in whose tickets he traffics. He is a part of the general public and railway companies, as common carriers, must permit all who pay the regular fare to travel on their trains.

Here the man was sick; he offered to pay his fare; it was denied him. He was angrily ordered off the train; the train was stopped in order to put him off; the manager directed the conductor to put him off.

This was the equivalent of force, even if actual force was not used, though as to that the testimony is conflicting, plaintiff claiming the conductor took him by the arm, led him to the steps of the platform and demanded of him to get off. The conductor denies that he put his hands on him, though he admits standing on the steps when Ford got off, and he followed him off, getting back on the car, himself, at the rear end as it passed on again. There is no denial by either the conductor or the manager that Ford was ordered off the car.

[1] Only a summary of the facts is given, and part of the opinion is omitted. — ED.

THURSTON *v.* UNION PACIFIC RAILROAD CO.

Fed. Cas. No. 14019. 1877.

DUNDY, District Judge. The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract, by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money. Judgment on verdict.[1]

REASOR *v.* PADUCAH & ILLINOIS FERRY CO.

152 Ky. 220. 1913.[1]

LASSING, J. A steamboat company, holding itself out to the public as a carrier of passengers and freight, is a common carrier, within the meaning of the statute; and the duties imposed upon common carriers by the laws of the land are applicable to it. The fact that it is running a special excursion does not have the effect of relieving its owners of the duty imposed upon it as a common carrier. 6 Cyc. 535; Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293. One of the duties owing by a common carrier to the public is to carry, without discrimination, as far as practicable, all persons who apply for passage and tender in payment therefor the established fares, or provide themselves with tickets entitling them to passage. But this duty to serve the public does not deprive the carrier of the right to make reasonable and proper rules for the conduct of its business, among which may be enumerated the right to deny passage to or to exclude from its conveyance one already a passenger, if such person is in such an intoxicated condition as to be unable to care for himself, or as to make it probable that he will annoy or disturb the other passengers; or it may refuse passage to or exclude from its vehicle a person of notoriously bad character, or one habitually guilty of misconduct, when it is apparent that the safety and comfort of the other passengers will be endangered by the presence of such person in the conveyance. The fact that, on a former occasion, a passenger had been guilty of misconduct, drunk, boisterous, and indecent in his behavior toward other passengers, will not justify the carrier in refusing to permit him to again travel upon its conveyance, if, when he presents himself for passage, he is sober, and is conducting himself in a decent and orderly manner.

There is nothing in the record to show that appellant, on the occasion in question, was drunk, or drinking, or disorderly; on the contrary, the evidence distinctly negatives such an idea. The refusal of appellee to carry him as a passenger on its boat was based solely on the fact that he had not conducted himself in a gentlemanly manner on a former occasion. As stated, this fur-

[1] See Turner *v.* North Car. R. R. Co. (1869), 63 N. C. 522.

[1] The statement of facts and part of the opinion are omitted.— ED.

nished appellee no excuse for refusing him passage; and the trial court properly held this plea bad on demurrer.[2]

BOGARD'S ADM'R. *v.* ILLINOIS CENTRAL RAILROAD CO.

144 Ky. 649. 1911.[1]

SETTLE, J. A common carrier, independently of the contractual relation, is under a general obligation to receive and carry upon its trains all proper persons who apply for transportation and offer to pay the regular fare for such service. By the term "proper persons" is meant persons whose status or condition apparently entitles them to be carried as passengers. On the other hand, the carrier has the right to refuse to receive or carry as passengers, improper persons; that is, persons whose condition or conduct is such, from intoxication, disorderly conduct, contagious diseases, or other things, as to make their presence on the train dangerous to the lives or health of other passengers. Likewise, if the condition or conduct of a person, after being received as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the right and duty of the carrier's servants in charge of the train, upon receiving notice thereof, to eject such offending person from the train; but in doing so they must also exercise due care to protect his health and person from danger or unnecessary discomfort.

In such a case the carrier is bound to exercise a reasonable discretion, according to conditions as they reasonably appear at the time. Thompson on Negligence, vol. 3, § 3225.[2]

PRICE *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

75 Ark. 479. 1905.[1]

WOOD, J. A railway company is not required to accept as a passenger one without an attendant, who, from intoxication, is mentally or physically incapable of taking care of himself. But

[2] As to degree of intoxication which will justify refusal, see Pittsburgh, C. & St. L. Ry. Co. *v.* Vandyne (1877), 57 Ind. 576.

[1] Only an extract from the opinion is reprinted.— ED.

[2] As to the exercise of the right to eject a person who has been received as a passenger, but is afterwards found to be ill or intoxicated, see Louisville & N. R. R. Co. *v.* Logan (1889), 88 Ky. 232; Korn *v.* Railway Co. (1903), 125 Fed. 897.

[1] Only an extract from the opinion is reprinted.— ED.

it cannot refuse to receive as a passenger one who is capable of taking care of himself, and whose presence is not dangerous or hurtful or annoying to fellow passengers.

If the conductor of a passenger train accepts one as a passenger, unattended, who, from drunkenness, is unable to look after himself, he (the conductor), in so doing, is acting within the scope of his authority. It is one of the duties of the conductor to pass upon the eligibility, so to speak, of those presenting themselves for transportation.

If a conductor accepts a person as a passenger whom he knows to be unattended, and knows to be insensible from intoxication, and thereby unable to protect himself from danger and injury, the company owes him the duty to exercise such care as may be reasonably necessary for his safety. While the company is not an insurer of the person of one who has been received as a passenger in such condition, being cognizant thereof, it is bound to exercise all the care that a reasonably prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and mode of travel.

The railroad company must bestow upon one in such condition any special care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demand for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended and avoided. If its servants, knowing the facts, fail to give such care and attention, and injury results, as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury.[2]

PEARSON *v.* DUANE.

4 Wallace, 605. 1866.[1]

IN the month of June, 1856, the steamship *Stevens*, a common carrier of passengers, of which Pearson was master, on her regular

[2] As to the right to refuse to carry a blind person, see Illinois Cent. R. R. Co. *v.* Smith (1904), 85 Miss. 349.
As to the right to refuse to carry a person who is ill, but who has not an infectious disease, see Connors *v.* Cunard S. S. Co. (1910), 204 Mass. 310.
As to the right to exclude insane persons, see Pullman Car Co. *v.* Krauss (1906), 145 Ala. 395; Owens *v.* Macon & B. R. Co. (1903), 119 Ga. 230.

[1] Part of the statement of facts, the arguments of counsel, and part of the opinion are omitted.— ED.

trip from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary, yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," *upon penalty of death in case of return.* This committee had, in the fore part of June, against his will, placed him on the *Golden Age,* a steamer in the harbor of San Francisco, destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the *Stevens* afforded the first opportunity to get back, which he was anxious to embrace, being willing to encounter the risk to which his return might expose him. Duane went openly on the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being aboard until after the ship got to sea, but no directions had been given for his expulsion, and though he was without a ticket, or money to buy one, yet a passenger, who had the means, offered to pay the purser his fare, who declined receiving it.

It was usual for those persons who wished to secure a passage, to procure a ticket at Acapulco, but there was no imperative rule of the ship requiring it, and the customary fare was often paid to the purser after the boat had left the port.

There was no evidence that Duane would have been excluded, had the master been aware that he was on board before he left Acapulco, for it was quite clear that the circumstances of his banishment were unknown at that time.

The master, Pearson, was aware that the Vigilance Committee was in control of San Francisco, and ascertained in some way that Duane had been expelled by them from California, and if he returned, would be in danger of losing his life. Having learned this, he resolved to put Duane aboard the first down ship he met, and send him back to Acapulco. The steamer *Sonora,* commanded by Captain Whiting, and one of the same line of steamers of which Pearson, was master, very soon came in sight, and was stopped. Whiting informed Pearson that he had orders not to carry back any banished person, and that Duane *would certainly be executed if he returned,* and advised that he should be sent to the *Sonora,* and he would endeavor to persuade him to go on with him.

Thereupon Duane was transferred to the *Sonora,* and landed at Acapulco. The transfer was effected without any personal indignity to Duane, who at first resisted, but was induced to yield to superior force, by friendly counsels.

MR. JUSTICE DAVIS delivered the opinion of the court.

This case is interesting, because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship *Stevens*, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.[2]

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the *Sonora*. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.[3] Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But, the sum of four thousand dollars awarded as damages, in

[2] Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

[3] Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

this case, is excessive, bearing no proportion to the injury received. Duane is entitled to compensation for the injury done him by being put on board the *Sonora,* so far as that injury arose from the act of Pearson in putting him there. But the outrages which he suffered at the hands of the Vigilance Committee, his forcible abduction from California and transportation to Acapulco, the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by Pearson. Every one, doubtless, to whom he applied for passage, knew the power of the Vigilance Committee, and were afraid to encounter it, by returning an exile, against whom the sentence of death had been pronounced.

Pearson had no malice or ill-will towards Duane; and, as the evidence clearly shows, excluded him from his boat, in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for Duane to seek to go back there. Common prudence required that he should wait until the violence of the storm blew over, and law and order were restored.

MATTER OF CULLEN *v.* NEW YORK TELEPHONE CO.

106 N. Y. App. Div. 250. 1905.

APPEAL from Special Term, Kings County.

Application by James R. Cullen for a writ of peremptory mandamus against the New York Telephone Company to compel it to render telephone service to him. From an order denying the application, the applicant appeals. Affirmed.

WILLARD BARTLETT, J. We are not prepared to say that the discretion of the learned judge at Special Term was improperly exercised in this case in denying the appellant's application for a peremptory writ of mandamus commanding the respondent to install a telephone instrument in the cigar shop of the appellant, and to render him the customary telephone service in connection therewith. The writ of mandamus will not issue in cases of doubtful right. People *ex rel.* Nicholl *v.* N. Y. Infant Asylum, 122 N. Y. 190. Indeed, it may often properly be refused, in the exercise of judicial discretion, even where the applicant has a cause of action enforceable in a suit for damages. The papers presented to the court at Special Term in this case set out facts and circum-

stances warranting a suspicion on the part of the police authorities that the premises of which the appellant's cigar shop form a part were used for pool-selling purposes prior to the beginning of his tenancy, and also indicating his presence in and about the place so frequently as to justify the inference that he may well have been cognizant of the fact that the law had thus been violated there. On one occasion during the period when he was a frequent visitor, several persons were arrested by the police there upon the charge that they were engaged in the business of selling pools on horse races, in violation of section 351 of the Penal Code. A telephone instrument which had been installed by the respondent for the service of an express company had been removed by the police, and the restoration of the service refused without the institution of any legal proceedings to compel its restoration. In behalf of the appellant it is insisted that he is not chargeable with knowledge of these transactions antedating his tenancy; but, as I have intimated, his frequent visits, which are stated to have numbered more than three or four a week between the 1st day of March, 1904, and the 12th day of February, 1905, render it somewhat improbable that he did not know what was going on. However this may be, it is to be noted that, according to the appellant's own affidavit, the refusal of the respondent to furnish him with a telephone instrument and service was not absolute in character. His application was made to Mr. W. F. Baker, the contracting agent of the respondent, who, at the close of the interview, told the appellant's counsel that if Mr. Cullen would write a letter to the telephone company stating that he would not, and did not intend to, use the telephone for illegal purposes, and would give the company a reference, "he would take up the matter with the general manager of the company."

Under the circumstances, this does not seem to us to have been an unreasonable requirement. The New York Telephone Company had been informed by the police department that the premises had been used as a poolroom. It was also aware that a telephone which it had previously installed therein had been removed therefrom by the police. The officers of the company might not unreasonably apprehend that they would render themselves liable for aiding and abetting a violation of the law if they furnished further telephone service to the premises in view of this information. It was quite proper, therefore, for them to request the assurance from the appellant which the contracting agent suggested, and for them also to require the appellant to furnish a reference as to his character. The action of the corporation in refusing to comply with the appellant's demand until the assurance and reference thus requested should be supplied was not a final refusal. The statement of the

contracting agent that he would thereupon take up the matter with the general manager of the company was a promise to act upon the application thereafter with an open mind and a fair consideration of the whole case, such as might lead the company to put in the desired instrument and serve the appellant as a telephone subscriber. This attitude on the part of the defendant corporation, if nothing else, justified the court at Special Term in denying the appellant's application for the discretionary and prerogative writ of mandamus.

The order appealed from should be affirmed.[1]

Order affirmed, with $10 costs and disbursements. All concur.

WIEMER *v.* LOUISVILLE WATER CO.

130 Fed. 251. 1903.[1]

EVANS, District Judge. Although the court has given this case very attentive consideration, it is too much pressed for time just now to do more than state its conclusions generally without going into details. By his bill and the pending motion the complainant, Wiemer, seeks an injunction, mandatory in character, to compel the defendant to supply him with water; he offering full security for the payment of the price thereof. The learned counsel for the defendant do not contest the general proposition that the defendant is a corporation which owes certain duties to the public, and the court is of opinion that those duties are, in general terms, very accurately defined in the following language, found in section 931, 3 Cook, Corp., viz.: "A waterworks company is also a *quasi* public corporation. It must supply water to all who apply therefor and offer to pay the rates." Indeed, the latest authorities seem very definitely to establish the rule that water supply companies like the defendant are required to supply water impartially to all consumers, and that they cannot act capriciously, nor discrimi-

1 Compare Godwin *v.* Car. Tel. & Tel. Co. (1904), 136 N. C. 258.

See Gray *v.* Western U. T. Co. (1891), 87 Ga. 350, and Gist *v.* Telegraph Co. (1895), 45 S. C. 344, as to messages with regard to the sale of options.

See Nye *v.* Western U. T. Co. (1900), 104 Fed. 628, and Western U. T. Co. *v.* Cashman (1906), 149 Fed. 367, as to libelous messages.

See State *ex rel.* Webster *v.* Nebraska Tel. Co. (1885), 17 Neb. 126, State *ex rel.* Payne *v.* Kinlock Tel. Co. (1902), 93 Mo. App. 349, and Cumberland T. & T. Co. *v.* Hobart (1906), 89 Miss. 252, as to the right to deny service because of outstanding debt or dispute.

See State *ex rel.* Gwynn *v.* Citizens' Tel. Co. (1901), 61 S. C. 82, as to the right to deny service because applicant is being served by another telephone company.

1 Part of the opinion is omitted.— ED.

nate against any one who is able to pay for the water supplied. In short, to phrase it in familiar terms, the law does not allow such companies to unduly advantage any customer by doing for him what it will not do for others under circumstances substantially the same. Griffin *v.* Goldsboro, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Haugen *v.* Albina, 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424. Whether so intended or not by defendant, the court is of opinion that the effect of what was done in this case, as shown by the testimony, was to unduly discriminate against the complainant and in favor of the Louisville Tramway Sprinkler Company, a rival in the business of street sprinkling. Perhaps there can be no two opinions upon this proposition of fact when all the testimony is attentively considered, but it is very earnestly urged for the defendant that the complainant has, in no event, any right to claim a supply of water from the defendant, because he is not an "inhabitant" of Louisville, Ky., and the language of the first section of the charter of the defendant is quoted and relied upon to support the contention. That language is that Thomas E. Wilson and others are hereby made a corporation "with power and authority to construct and establish within the city of Louisville or elsewhere for the purpose of supplying said city and its inhabitants with water." 2 Acts 1853–54, p. 121, c. 507. It appears alike from the bill of complaint and from the testimony heard that the sole purpose for which the water sought to be obtained by the complainant is to be used by him is that of sprinkling the streets in front of the houses of "inhabitants" of this city, and the court, in the absence of any authority to the contrary, is clearly of opinion that the construction contended for is very much too narrow. The charter does not demand that the "inhabitants" of Louisville, in obtaining water for the useful, and, indeed, necessary, purpose of sprinkling the streets, shall be allowed to get it only through the medium of an "inhabitant" of the city. The beneficial thing — the essential purpose — in this instance is at last to supply water for the use of "inhabitants" of Louisville alone, and that fact seems to bring the case clearly within the intention and the equity of the statute creating the defendant. The relations between the complainant and the defendant are much more accurately described by what has just been said than they are by the suggestion that the defendant is simply a wholesale dealer in water and the complainant a mere retailer thereof. The duties of the defendant to the public imply very much more than it is a mere vender of its own property to those to whom it sees fit to sell it. And so it may be said that the cost to the complainant of the water is a very small part of the cost of what is

required to sprinkle the streets for property holders or their tenants.[2]

DETROIT GAS CO. *v.* MORETON TRUCK AND STORAGE CO.

111 Mich. 401. 1897.[1]

GRANT, J. Replevin. Property replevied: A gas meter of the value of six or seven dollars. The cause of the suit: The refusal of the defendant to pay a bill for furnishing 60 feet of gas pipe, and labor, to connect defendant's stables with plaintiff's gas-pipe line. The amount of the bill rendered, according to plaintiff's testimony, was $7.45, according to defendant's testimony, $11.50. The suit was instituted in justice's court, and was appealed to the circuit court, and then to this court. The circuit court held that title to the meter was in plaintiff, that the right of possession was in defendant, that plaintiff could not maintain the action, refused to award the return of the property, and directed the jury to assess damages to the defendant, which they did at the sum of $55. As long as the law permits such petty suits to be appealed from one court to another till they reach the court of last resort, imposing expense upon litigants and the public,

[2] Upon appeal the Circuit Court of Appeals, in Louisville Water Co. *v.* Wiemer (1904), 130 Fed. 257, without expressly deciding the point passed upon by the court below, reversed the decision, declaring that the regulation, under which service was denied to the complainant, was reasonable, namely, that water for sprinkling would only be supplied to the one person in each district who was approved of by the largest number of inhabitants. But the Court added:

"Similar, if not the same, questions were involved in the case of Fuhring against the Louisville Water Company (a case decided by the Court of Appeals of Kentucky in 1879, but not reported). That was the case of a petition for a mandamus to compel this same company to furnish water to the petitioner wherewith to sprinkle the streets of Louisville. The Court of Appeals, waiving all question of propriety of the remedy sought, and assuming that the company was bound to furnish an adequate supply of water for sprinkling the streets of the city, held that the plaintiff, it not appearing that she resided or did business or owned property on any of the streets which she proposed to sprinkle, had no such special interest as would entitle her to the relief sought; and, further, that, because of the confusion and waste that would otherwise ensue, the company might lawfully restrict its choice to one person, and that such choice was left to the company, no tribunal being expressly appointed for that purpose. In that case it does not appear that another had been already licensed, and the case goes upon the broad grounds that a person having no special interest by reason of residence or ownership had no right to coerce the choice of the company by compelling the selection of himself. The case goes further than the present, for here the company gave the plaintiff a chance to qualify himself of which he would not avail himself. The court below thought itself not bound by the decision referred to for the reason that the case might have been decided upon the fitness of the remedy. But as we think it sound in respect to the question involved, we accept it as confirmatory of our own views, without deciding whether we should be bound by it or not."

[1] One paragraph dealing with questions of damages is omitted.— ED.

costing many times the amount involved, the courts must determine them upon legal principles, notwithstanding they take time which ought to be devoted to important suits.

Two questions are presented: (1) Had plaintiff the right to remove the meter? (2) If it had not that right, what is the measure of damages?

1. In disposing of the first question we shall assume that the defendant is liable for the reasonable cost of putting in the service pipe. It is conceded that the plaintiff owns the meter, and that it may remove the same for nonpayment of gas consumed. It is argued that the company could not remove it for nonpayment of the bill for making the connection and piping the defendant's barn, and the court so instructed the jury. This involves a determination of the contract between the parties. The connection was made, the pipe furnished, and the meter put in for the sole purpose of furnishing gas to the defendant. The agreement to do these things and to furnish gas were parts of the same contract. If the company may remove its meter for failure to comply with the one provision of the contract, it is difficult to understand why it may not for failure to comply with the other. The defendant agreed to pay for both. The plaintiff is under no obligation to continue to perform its part of the contract when the defendant has refused compliance. Under the defendant's contention the gas company might pipe a man's building at great expense, for which he agreed to pay, and when it was done, and the meter in place, be compelled to furnish gas so long as he paid for the gas consumed, although he refused to pay the other bill. Suppose that before the meter was put in the man should refuse to pay, would the company be liable for damages for not putting in the meter? Would he be entitled to the meter without first paying or tendering the reasonable cost of piping? To these questions there can be but one answer. If A. agrees to place a machine, the title to which remains in A., upon B.'s land, and to do further work with it for B. after it is so placed, upon condition that B. pay expenses of moving and placing the machine, and after A. has done this work B. refuses to pay, B. cannot say to A., "I will not pay you for moving and placing the machine, but you must keep it on my land and work it for my benefit so long as I pay you the agreed price for its use." A. has two remedies. He may either remove his machine or he may go on with his contract and sue B. for the labor performed. This practically illustrates the defendant's position,— that plaintiff must continue to perform its part of the contract, while defendant violates its part. Its counsel cites no authority to support it. The present case is not one of the

ordinary performance of labor or the furnishing of materials, unattended with any other conditions. We think the plaintiff was entitled to remove its meter, and to maintain the action of replevin upon refusal to deliver it.[2]

STATE *ex rel.* WOOD *v.* CONSUMERS' GAS TRUST CO.

157 Ind. 345. 1901.[1]

MANDAMUS by the state, on relation of Ann E. Wood, against the Consumers' Gas Trust Company to compel defendant to permit relatrix to use natural gas from its main. From a judgment for defendant, plaintiff appeals.

HADLEY, J. The things requested and commanded of the appellee were to lay a service pipe from its main in Bellefontaine street to the property line in front of the relatrix's house, and to permit her to use the gas. The mandate is not to furnish the relatrix with an adequate or any definite amount of gas, but the obvious force and limitations of the request and order are to require the appellee to furnish her with the necessary means, and permit her to use the gas upon the same terms that other inhabitants of the city are permitted to use it. Is it the legal duty of appellee to do these things? Mandamus is a proper remedy to compel appellee to furnish gas to the relatrix if it is shown that she is entitled to it. Portland Natural Gas & Oil Co. *v.* State, 135 Ind. 54, 21 L. R. A. 639.

The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipe lines through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public in whose behalf the grant is made, and the benefit received by the citizen is the adequate considera-

[2] As to the right to discontinue services because of a patron's failure to pay a bill owed by a former occupant of the premises, see Miller *v.* Wilkes-Barre Gas Co. (1903), 206 Pa. 254. Under a statute allowing discontinuance when a person is in arrears, see Morey *v.* Metropolitan Gas L. Co. (1874), 38 N. Y. Super. Ct. R. (6 Jones & Sp.) 185.

As to the right to refuse or discontinue service because of a patron's failure to pay for gas furnished to him previously at other premises, see Gas Light Co. *v.* Colliday (1866), 25 Md. 1; Mockin *v.* Portland Gas Co. (1900), 38 Or. 120; Lloyd *v.* Washington G. L. Co. (1881), 15 D. C. (1 Mackey) 331. Under statute, see People *v.* Manhattan G. L. Co. (1865), 45 Barb. 136.

[1] Part of the opinion is omitted.— ED.

tion for the right and convenience surrendered by him. The grant thus resting upon a public and reciprocal relation imposes upon the appellee the legal obligation to serve all the members of the public contributing to its asserted right impartially, and to permit all such to use gas who have made the necessary arrangements to receive it and apply therefor, and who pay, or offer to pay, the price, and abide the reasonable rules and regulations of the company. Portland Natural Gas & Oil Co. *v.* State, 135 Ind. 54; Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 36 L. R. A. 535; Haugen *v.* Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; People *v.* Manhattan Gaslight Co., 45 Barb. 136; Crumley *v.* Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058; American Waterworks Co. *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; State *v.* Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. Rep. 574.

But without controverting the law as declared in the foregoing cases, or claiming exemption from the rule, it is answered, as a justification for denying the relatrix the use of gas, that the corporation was organized as a voluntary enterprise, in the general interest of the people of Indianapolis; that its purpose was not the making of money for any one, but to furnish gas to consumers in the city at the lowest possible rate; and that the supply of gas the corporation has on hand, or that it may possibly procure, is insufficient to supply what customers it has now connected with its mains, in severely cold weather; and that to permit the relatrix to use gas would be to further reduce the already insufficient supply. Will these facts relieve the appellee of its duty to permit the relatrix to use its gas? If they will, then it must be true that the relatrix is not entitled to share in the gas furnished by appellee to the inhabitants of the city, because her participation will reduce the possible supply below the full requirements of those already being served.

It is proper to observe that the present consumers of appellee's gas are not here complaining of the quantity of gas received by them, or protesting against the admission of the relatrix to a share of the supply; and it is difficult to see how the appellee, while continuing to assert and exercise its extraordinary rights, may set up its own default, or probable default, to others as a legal excuse for the nonperformance of its duty to the relatrix.

The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has ren-

dered her share of the consideration. Bellefontaine street, in front of her house, has been dug up, and her property made servient to the use of appellee in laying its pipes and in carrying forward its business, and her right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the street in which appellee has laid its pipes or it is held of right by none. The legislature alone can authorize the doing of the things done by appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Cooley, Const. Lim. (6th Ed.) p. 651, and cases cited.

Appellee's contract is with the state, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen, similarly situated, who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority or superiority of right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So, if appellee has found it impossible to procure enough gas to fully supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class, to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed us to no special charter privilege, and, under the law of its creation, certain it is that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts; "and no statute has been deemed necessary to aid the courts in holding that, when a person or company has undertaken to supply a demand which is 'affected with a public interest,' it must supply all alike who are like situated, and not discriminate in favor of nor against any." 45 Cent. Law J. p. 278; Haugen *v.* Water Co., 21 Or. 411; Olmsted *v.* Proprietors, 47 N. J. Law, 311; Stern *v.* Wilkes Barre Gas Co., 2 Kulp, 499; Chicago & N. W. Ry. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Nebraska Tel. Co. *v.* State, 55 Neb. 627;

Watauga Water Co. *v.* Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841; State *ex rel. v.* Delaware etc. R. Co., 48 N. J. Law, 55, 2 Atl. 803, 57 Am. Rep. 543.

In a further material sense, the discrimination asserted by the answer becomes injurious to the relatrix. It is a matter of common knowledge that natural gas is a cheap and convenient fuel, and for many reasons is eagerly sought by those who may reasonably obtain it. It is therefore of like knowledge that, in a community where it is supplied to some premises and denied to others, the effect is to enhance the value of such parcels as have it, by making it more desirable and profitable to occupy them, and to depreciate the value of such parcels as are excluded from its use. It is very clear that appellee may not, under the guise of administering a public benefit, exercise a public power to take the property of one and confer it upon another.

The principal argument of appellee's counsel is that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and mandamus will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that mandamus will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding, that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable and nothing impossible of performance. The whole question comes to this: The appellee, under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix, owning a lot abutting on one of appellee's lines, erected thereon a dwelling house, and, upon the faith of being permitted to use the gas, has piped her house, and constructed her heating apparatus of a form suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has, in common with other abutters, been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in deny-

ing her the rights accorded to those of her neighbors who have contributed in the same way to appellee's enterprise. The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.

Section 3.

The Right of Public Service Companies to Serve Themselves.

HANNAH *v.* THE PEOPLE.

198 Ill. 77. 1902.[1]

Boggs, J. This is an appeal by John S. Hannah from a judgment of the circuit court of Cook county adjudging him guilty of contempt and imposing a fine of $100 for violating a decree of that court enjoining him and other interested parties from storing in the public warehouse of the Central Elevator Company any grain directly or indirectly owned by or belonging to said elevator company or the firm of Carrington, Hannah & Co., of which appellant was a member, or in which said corporation or firm had any interest other than as public warehousemen. Upon information in chancery theretofore filed in said circuit court by the attorney general against said Central Elevator Company and eight other companies, they and each of them, their managers, agents and employés, had by the decree of said court been enjoined from storing and mixing their own grain with the grain of their customers in their own elevators. Appeals were taken from the decrees in those cases to this court, where they were affirmed. Central Elevator Co. *v.* People, 174 Ill. 203. While these appeals were under consideration in this court the legislature passed an act, approved May 26, 1897 (Laws 1897, p. 302), amending section 6 of the warehouse act of April 25, 1871, purporting to make it lawful for owners, lessees, or managers of public warehouses of class A to store their own grain and mix it with the grain of others of the same grade in their own warehouses, on condition hereinafter set forth. After this act was adopted, and after the decree was affirmed by this court, the appellant, as man-

[1] The arguments of counsel and part of the opinion are omitted. Wilkin and Carter, JJ., dissented without opinion.— Ed.

ager of the Central Elevator Company, and who was one of the owners of stock in said company, with full knowledge of said decree and its affirmance, and of the perpetual injunction thereby granted, stored and continued to store the grain of the elevator company, and of the copartnership of which he was a member, in the warehouse of said company, claiming the right to do so under said amendatory act of 1897, but disclaiming any intent to violate the injunction of the court. In the proceedings instituted against Hannah as for contempt the circuit court held that the act of 1897 was unconstitutional and void, and entered the judgment and imposed the fine appealed from.

Under the constitution of 1870, and the enactment of 1871, adopted in obedience to the constitutional requirements, public warehouses licensed under the act of 1871 are public agencies, and licensees under that act are to be regarded as pursuing a public employment, and as charged with the performance of duties toward the public. In applying for and accepting their licenses, such warehousemen voluntarily submitted their business and their property to the control of the law, to the end that the performance by them of their duties to the public might be accomplished and enforced. The constitution declares such warehouses shall be public warehouses. This constitutional provision impresses the business of keeping a public warehouse with a public use, and those who apply for and accept licenses to keep public warehouses under the act of 1871 voluntarily occupy a relation to those who store grain in their warehouses, or have the right to so store grain, which makes it incumbent upon such warehousemen to discharge certain duties to such owners and producers and shippers of grain. The license authorizes the warehouseman to pursue a public employment. The law implies, as a condition of the acceptance of a license to conduct a public warehouse, that the licensee is not disqualified upon any ground of interest adverse to that of those whom, by the acceptance of the license, he undertakes to represent and serve, from discharging the duties of a public warehouseman, and that he will remain so disinterested and qualified while he holds that relation to the public. Speaking upon that subject, we said in Central Elevator Co. *v.* People, *supra,* p. 207: "It is a firmly established rule that, where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to the temptation of acting contrary to that duty or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to

which alone it will be applied. They have applied it to agents, partners, guardians, executors, administrators, directors, and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that duty, and he will not be permitted to expose himself to temptation or be brought into a situation where his personal interests conflict with his duty. Courts of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor to see that he does not violate his duty, but forbid such a course of dealing, irrespective of his good faith or bad faith. If the duty of the defendants as public warehousemen stands in opposition to personal interest as buyers and dealers in grain storing the same in their own warehouses, then the law interposes a preventive check against any temptation to act from personal interest by prohibiting them from occupying any such position. The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty toward the public."

That the exercise of the right purported to be given to the keepers of public warehouses by the said amendatory act of 1897 to store their own grain in their own warehouses, mix it with any grain of others which they may decide is of like grade as their own grain, and issue and buy warehouse receipts representing or purporting to represent their own grain, etc., is incompatible with the fair, faithful, and impartial discharge of the public employment of a keeper of a public warehouse, is well shown by the following extract from the opinion of this court in said Central Elevator Co. *v.* People, *supra,* p. 208: "The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. The grades established for different qualities of grain are such that the grain is not exactly of the same quality in each

grade, and the difference in market price in different qualities of the same grade varies from 2 cents per bushel in the better grades to 15 cents in the lower grades. The great bulk of grain is brought by rail and in car loads, and is inspected on the tracks, and the duty of the warehousemen is to mix the car loads of grain as they come. Such indiscriminate mixing gives an average quality of grain to all holders of warehouse receipts. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition and to combine in establishing a monopoly, by which a great accumulation of grain is, in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear." And further in the same cause we held it was inconsistent with the duties and obligations the said Central Elevator Company owed to the public for it to buy grain and store the same in the public warehouse which it was licensed to conduct, and as public warehouseman to issue receipts or certificates for such grain to itself.

Judgment affirmed.

UNITED STATES *v.* LEHIGH VALLEY RAILROAD CO.

220 U. S. 257. 1910.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is one of what were known as the commodity cases, previously decided and reported in United States *v.* Delaware & Hudson Co., 213 U. S. 366. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of the fifth paragraph of the 1st section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act. The clause is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier." 34 Stat. 584, c. 3591.

In effect, the contention of the government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision, which had been manufactured, mined, or produced by the companies or under their authority, or which were, at the time of the transportation, owned by them, or which had been previously owned by them in whole or in part, or in which the companies then or previously had any interest, direct or indirect. The government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined, or produced by a corporation in which the transporting

[1] The arguments of counsel and part of the opinion are omitted.— ED.

railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute, as construed by the government, was repugnant to the Constitution.

In coming to determine whether the government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured, or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced, or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or in part; (c) when the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, or produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

Thus construed, the clause was held to be within the power of Congress to enact.

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate, the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies men-

tioned in the original bill, viz., the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause.

It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a *bona fide* corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant, at the time of transportation and before the act of transportation, has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation, and over the subsequent sale thereof."

On the objection of the railway company, the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further, in view of the fact that the proposed amendment had been disallowed," the

court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed, and in dismissing the suit.

Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits,— a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.[2]

[2] For a further application of the Commodities Clause, see Delaware, L. & W. R. R. Co. *v.* United States (1913), 231 U. S. 363.
See New York, N. H. & H. R. R. Co. *v.* Interstate Com. Com. (1905), 200 U. S. 361, decided before the passage of the Commodities Clause.

CHAPTER III

THE RIGHT TO MAKE RULES FOR THE SERVICE.

HARP *v.* CHOCTAW, OKLAHOMA & GULF RAILROAD CO.

125 Fed. 445. 1903.[1]

THAYER, Circuit Judge. The facts developed at the trial below, concerning which there was practically no controversy, are these: From September, 1900, to February 15, 1902, and thereafter, the Choctaw, Oklahoma & Gulf Railroad Company, the defendant in error, operated a line of railroad extending from El Reno, in the territory of Oklahoma, thence eastwardly through the territory of Oklahoma, the Indian Territory, and the state of Arkansas, to Memphis, Tennessee. Coal fields existed along this line of road from South McAlister, in the Indian Territory, eastward to a point between Hartford and Mansfield, both of the latter places being in the state of Arkansas, or for a distance altogether of about 100 miles. The defendant company made a practice of hauling coal taken from the mines contiguous to its road, which belonged either to itself or to other persons and corporations, and about 60 or 70 per cent. of its traffic was of that character. When a mine owner, other than the defendant company, desired to employ the defendant to haul his coal, he made application to that effect to the company, and if, on an examination of the applicant's mine by the executive officers of the railroad, the quantity of coal therein seemed to be adequate to justify the expense, the general practice was to enter into an agreement with the mine owner whereby the latter undertook to procure the right of way and grade a track leading from the railroad to his mine, and to supply the necessary ties, the railroad, on its part, agreeing to furnish the necessary iron and to lay the track, and thereafter keep the track and roadbed in good repair. It was also the usual practice in such agreements to require the mine owner to develop his mine so that it would supply a certain number of cars of coal per day, and to equip it with tipples and screens so that coal could be conveniently and speedily loaded into cars at the mine. In the month of September, 1900, the defendant's road in the vicinity of Hartford, Ark., had been re-

[1] Part of the opinion is omitted.— ED.

cently constructed, and the volume of traffic at that station was small. The railroad company, before building its road eastwardly into the state of Arkansas, had bought about 1,600 acres of coal land near Hartford, and had located its station at that point on a part of the tract. The coal fields in that vicinity had been only slightly developed in the month of September, 1900, but there was one coal mine called Glenn's Bank that had been opened near the station to supply the local demand for coal, and after the railroad was opened for business, and during the fall of the year 1900 and the winter of 1901, the parties controlling this mine were allowed to haul coal to the station by wagons and load it on cars that were set out upon a side track. The plaintiff at that time was also in possession of a mine near the station, and at his request, and as the traffic at the station was not large, he was accorded the same privilege of loading coal from wagons into cars standing on the house track, which privilege he continued to exercise until the spring of the year 1901, up to which time, during a period of seven or eight months, he had loaded altogether something over 300 cars. During the period in question the railroad company did not permit coal to be loaded from wagons into cars standing upon its sidetracks at any of its stations, except at the Hartford station, and at one other station called Red Oak, in the Indian Territory, at which latter place, as it seems, the practice was pursued temporarily until a spur track could be completed to the mine, which was some distance from the railroad. The defendant gave permission to load coal from wagons at Hartford mainly, if not entirely, for the purpose of aiding in the development of the coal measures at that point, but with no intention on its part of receiving coal permanently in that way, or of permitting its station side tracks to be used continuously for the purpose of standing coal cars thereon to be loaded from wagons. Some time in the spring of the year 1901, or the early summer of that year, the plaintiff was advised, by officers of the railroad company, that the practice of setting out cars on the station side tracks to be loaded from wagons would have to be discontinued. Thereafter there were several interviews between the plaintiff and persons representing the railroad company relative to the construction of a spur track to the plaintiff's mine for his benefit and accommodation. The railroad company appears to have been willing at all times to lay such a track and to furnish the iron therefor, provided the plaintiff would secure a right of way and do the grading. The plaintiff on his part appears to have been willing at first to accept this proposition. They differed, however, as to the place where the spur track should connect with the main line of the road; the plaintiff insisting that

the connection should be made at the station house at Hartford, and the defendant objecting to a connection at that point. The negotiations looking to the construction of a spur track accordingly fell through, and on August 15, 1902, the defendant company peremptorily declined to permit cars to be further loaded from wagons at its station or house track, the reason assigned for such action being, in substance, that it was the universal practice of all railroads engaged in hauling coal to require mine owners and coal shippers to have tipples and tracks whereby coal could be speedily loaded direct from the mines, and because of the annoyance, inconvenience, and delay necessarily attendant upon the loading of coal cars from wagons at stations. The plaintiff thereafter made complaint concerning the defendant's action to the board of railroad commissioners of the state of Arkansas, and in view of threatened action by that body the defendant company on October 7, 1902, again permitted cars to be loaded at the Hartford station from wagons, provided the coal so loaded was consigned to points within the state of Arkansas. At a later date, in January, 1902, for the same reason — that is to say, because of action taken or threatened to be taken by the board of railroad commissioners for the state of Arkansas, and to avoid the possible assessment of heavy penalties — the order against loading from wagons at the Hartford station, as respects coal consigned to any point on the defendant's railroad, either within or without the state of Arkansas, was revoked.

The fundamental question which this state of facts presents would seem to be whether the defendant company, by setting out coal cars on its house track at Hartford, and permitting them to be loaded from wagons for a period of several months, under the circumstances above detailed, thereby obligated itself to continue that practice, and was guilty of a legal wrong when it discontinued it in August, 1901. Undoubtedly a common carrier must accept and transport all commodities that are tendered to it for carriage which it holds itself out to the world as engaged in carrying, provided a reasonable compensation for the service is also tendered. Unlike a private carrier, it is not entitled to choose its patrons or customers, but, being a quasi public servant, must serve everybody who chooses to employ it, and must treat them impartially, charging each the same rate for substantially the same service, and affording to each the same facilities for shipment. A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. It is entitled in the first instance to determine what class of commodities

it will engage in carrying. Moreover, it is entitled, in the first instance, by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and providing how they shall be packed for shipment so that they may be handled and transported conveniently, safely, and expeditiously. Hutchinson on Carriers, §§ 111–113, and cases there cited. This power to make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public. It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded into the cars by the slow process of shoveling. The useless consumption of time, and the additional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business. In the case at bar one of the witnesses testified, in substance, that, if all the coal tributary to the defendant's railroad was loaded by wagon, the mines would not produce 20 per cent. of their present output because of the impossibility of handling the output in that way. This is in itself an entirely reasonable statement, and no attempt was made by the plaintiff to disprove it; his contention being apparently that, because the defendant had permitted him to load coal from wagons for a few months, it had deliberately chosen that method of receiving coal and serving the public, and was bound perforce to continue the practice indefinitely. We are of opinion that this contention on the part of plaintiff is untenable, and should be overruled. The evidence shows without contradiction, as heretofore stated, that the practice of permitting a shipper of coal to load cars from wagons at stations obtained at no other station along the defendant's road save at Hartford and Red Oak, where the prac-

tice was tolerated temporarily, and for special reasons, with no thought of pursuing it permanently. The great bulk of coal that the defendant received and transported over its road was loaded by means of tipples into cars standing on spur tracks which had been laid to the mines, and in so far as the defendant had held itself out to the world as a common carrier of coal it can only be said to have so held itself out provided the commodity was so delivered and loaded. We entertain no doubt that the defendant had the right to abandon the method of receiving coal which it had adopted at Hartford when the conditions that led to the practice at that station had so far changed as to render its further continuance inconvenient and burdensome. Especially should this right be conceded to the defendant when we reflect that if it permitted coal to be hauled to that station in wagons, and thence loaded into cars, other mine owners along its line might and probably would assert the same privilege, thereby subjecting it to great loss and expense, besides putting the public to much inconvenience. That conditions had materially changed at the Hartford station between September, 1900, and August, 1901, admits of no controversy. It was proven at the trial, and not denied, that in the meantime the defendant had disposed of its coal land at that point; that several large mines had been opened in the immediate vicinity of that place; that the station had become a large shipping point for coal; that the volume of traffic at that place, as well as along the road generally, had largely increased during the year; that the demand for cars in August, 1901, to handle coal and other products which required shipment, was far greater than during the previous year; and that the public interest, as well as the interest of the carrier, demanded that there should be as little delay as possible in loading cars. Under these circumstances, we think that the defendant incurred no liability in refusing to permit its station side track to be further used for loading coal cars from wagons. Nor do we find that when the trial below ended any issue of fact as respects this point remained to be settled or decided by the jury, since all the material facts upon which the defendant's right to terminate the practice of loading cars from wagons depended were practically undisputed, and the existence or nonexistence of that right was a question of law to be determined by the court.

DE BOARD *v.* CAMDEN INTERSTATE RAILWAY CO.

62 W. Va. 41. 1907.[1]

POFFENBARGER, Judge. The railway company operated street car lines on Third avenue and Fourth avenue of the city of Huntington. What connection these two lines had is not clearly shown, but transfers were given by the conductors on the Third Avenue line which were good for passage on the Fourth Avenue line, if presented within one hour from the time of their issuance, shown by punch marks in the margin thereof. The plaintiff, an employe in the American Car & Foundry shops, situated in the eastern end of the city, took passage on a Third Avenue car going west, paid his fare, and took a transfer from the conductor. Having crossed over to Fourth avenue and waited a few minutes, he observed a car standing below Ninth street and started down to it. Before he arrived, the car moved on, and he walked on after it until another car came down, which he boarded, and handed the conductor the transfer. He was informed by the conductor that the transfer was not good for a passage on the car, although presented within an hour after the time at which it had been issued because it was tendered below a place known as "Johnson's Lane." He refused to pay any additional fare, and was ejected from the car. He resisted removal, and the conductor rang for the motorman, who came back with a crank in his hand, with which he struck the plaintiff across the knuckles to make him let loose of the bar to which he was clinging.

So much of the transfer as is material reads as follows:

Free Transfer.

Good only as indicated, if presented within one hour from time and date punched in margin — not transferable — and is accepted by passenger upon condition that the Company is not responsible for any error upon the part of the conductors in punching time and dates.

Camden Interstate Railway Co.

It does not disclose any such limitation as to the place at which it must be used as was enforced by the conductor. It appears from the testimony of a witness for the defendant that there was a rule forbidding its acceptance below Johnson's Lane, posted, among others, in the defendant company's barn, to which the public were not admitted.

[1] Part of the opinion is omitted.— ED.

The plain and undisputed state of facts, shown by the evidence, renders it unnecessary to consider many of the principles of law applicable to the rights of passengers and common carriers, respectively, growing out of contracts for carriage. On the face of the transfer but one limitation appeared, namely, that it should be used within one hour after the issuance thereof. If presented within that time, on the face thereof, it entitled the holder to a westward passage on any car of the company running on Fourth avenue. There is no evidence tending in the slightest degree to show that the plaintiff had any knowledge of any limitation upon that right. According to all the authorities, a paper so handed him, without any explanation, or any knowledge on his part of any limitation, constituted the contract between him and the company. Unlike steam railroads, street railways do not have a certain fare for passage between given points. The nature of their business is such as to compel them, for the most part, to charge a certain fare for a passage without reference to the distance; this, at least, was the method of the defendant company. The paper, on its face, therefore, entitled the plaintiff to carriage, and knowledge of a secret limitation embodied in some rule which he had never seen could not be imputed to him. That rule, therefore, constituted no part of the contract. "Railway passengers are not required to know the rules and regulations made by the directors of a company for the control of the actions of its agents and the management of its affairs." Hufford *v.* Railroad Co., 64 Mich. 631, 8 Am. St. Rep. 859. In that case, this principle was applied in favor of a passenger who had relied upon the representations of an agent as to the extent to which a ticket purchased by him was good for passage. It seems that the ticket on its face was a little uncertain. It was not controverted that the purchaser had read the ticket. Being uncertain as to what its language meant, he applied to the agent for an explanation, and was informed that it was good for a passage to the point to which the purchaser desired to go, and to which he had paid the fare. The conductor refused to carry him to that point, and required him to pay an additional fare for a portion of the distance. The authorities agree that the purchaser of a ticket, or a contractor for carriage, in order to be bound by a limitation, must have knowledge of it, but there is a disagreement among them as to what amounts to notice, and as to the extent of the duty of a person contracting for carriage to carefully examine all of the stipulations written or printed in the contract.[2]

[2] A verdict for the plaintiff having been set aside by the court below, that order was reversed and set aside, and the case remanded for the rendition of judgment on the verdict.— Ed.

CHENEY *v.* BOSTON & MAINE RAILROAD CO.

11 Met. 121. 1846.[1]

DEWEY, J. This case involves no question of the general duty of railroad companies to carry passengers who offer themselves and are ready to pay the usual rate of fare. It is only a question whether one who purchases a ticket, entitling him, by the rules of the company regulating the tariff of fares to a continuous passage through, and avails himself of the reduction in price allowed to such passengers, can insist upon being taken up as a way passenger, at such stations as he may elect to stop at, he having voluntarily abandoned the train that went through.

The question really is, what was the contract between the plaintiff and defendants. Now the case stated by the parties expressly finds that the price of tickets entitling the party to a passage in the cars from Durham to Boston, in one continuous passage, was $1.87½ for each, and for a passage from Durham to Exeter, and from Exeter to Boston, as separate trips, $2. Such was the regular and ordinary charge. It is true that the tickets themselves do not describe the passage to be one by the same train. Nor do they purport to entitle the holder to a conveyance by two separate trips, first by taking the cars to Exeter, and thence by a subsequent train passing from Exeter to Boston. They are silent as to the mode. It therefore was a contract to carry in the usual manner in which passengers are carried who have tickets of that kind.

It is said that the rules of the company were unknown to the plaintiff when he purchased the tickets, and therefore he ought not to be affected by them. This might very properly be insisted upon in his behalf, if it were attempted to charge him with any liability created by such rules; especially if it were attempted to enforce any claim for damages by reason of them.

The question, as to the right of the plaintiff to be transported as a passenger, does not depend upon his knowledge, at the time of the purchase of his ticket, of the difference of the price to be paid for a passage through the whole distance by one train, or that of a passage by different trains. The plaintiff might have inquired and informed himself as to that. If he did not, he took the mode of conveyance, the price of the ticket, and the superscription thereon, secure to him under the rules and regulations of the company. It appears, however, that before reaching Exeter, the plain-

[1] The statement of facts is omitted, the facts sufficiently appearing in the opinion.— ED.

tiff was fully apprised of the different rates of fare, and the rules applicable to way passengers, and that the agent of the defendants, the conductor of the train, offered to refund to him the money that he had paid for his tickets, deducting the usual fare from Durham to Exeter, which the plaintiff refused to accept. In the opinion of the court, this was all that the defendants were required to do; and as the plaintiff declined this offer, and thereupon left the train, stopping at Exeter, he voluntarily relinquished his passage through by a continuous train, for which he held a ticket, and whatever loss he has sustained was occasioned by his own act, and occurred under such circumstances as preclude him from all claim for damages for any default in the company in the matter. Nor can he sustain any legal claim to recover back the sum paid for his first ticket, or any part thereof. The offer to that effect was refused by him.

Judgment for the defendants.[2]

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO. *v.* GREENWOOD.

79 Pa. St. 373. 1875.[1]

October 20th, 1875. Before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, GORDON, PAXSON and WOODWARD, JJ.

Error to the Court of Common Pleas of Erie county: Of October and November Term 1875, No. 135.

This action was in case and was brought November 23d, 1873, by J. L. Greenwood and Sarah E., his wife, in her right, against The Lake Shore and Michigan Southern Railway Company. The cause of action was removing Mrs. Greenwood from one of the way freight train cars of the plaintiff at a distance from a station, be-

[2] See Johnson *v.* Concord R. R. Corp. (1865), 46 N. H. 213; Western U. T. Co. *v.* Neel (1894), 86 Tex. 368; Western U. T. Co. *v.* McMillan (1895), 30 S. W. (Tex.) 298; Gulf, C. & S. F. Ry. Co. *v.* Moody (1895), 30 S. W. (Tex.) 574; Knoxville Traction Co. *v.* Wilkerson (1906), 117 Tenn. 482; Florida E. C. Ry. Co. *v.* Carter (1914), 65 So. (Fla.) 254; McRea *v.* Railroad Co. (1883), 88 N. C. 526; Dietrich *v.* Pa. R. R. Co. (1872), 71 Pa. St. 432.

As to waiver of regulation, see Pickford *v.* Grand Junction Ry. Co. (1884), 12 M. & W. 765; Greenfield *v.* Detroit & M. Ry. Co. (1903), 133 Mich. 557; Missouri K. & T. Ry. Co. *v.* Herring (1910), 130 S. W. (Tex.) 1039.

With regard to breaches of regulations as affecting right of recovery for injury, see Macon & W. R. R. Co. *v.* Johnson (1868), 38 Ga. 409; Baltimore Ry. Co. *v.* Wilkinson (1868), 30 Md. 224; Renaud *v.* N. Y., N. H. & H. R. R. Co. (1912), 210 Mass. 553; Coburn *v.* Ry. Co. (1910), 243 Ill. 448.

As to liability in deceit for publishing false time-tables, see Denton *v.* Great N. Ry. Co. (1856), 5 El. & Bl. 860.

[1] The arguments of counsel are omitted.— ED.

cause she had no ticket, although she offered to pay the conductor the proper fare. She was removed under the following rule of the company: —

"NOTICE.— On and after February 1st, 1873, passengers will not be carried under any circumstances upon any freight trains, except such as are designated as way freights upon the time tables, and they will not be carried upon way trains unless they are provided with tickets. Way freights will not stop at the stations where tickets are not sold to receive nor to let off passengers."

On the trial before Vincent, P. J., April 16th, 1875, Mrs. Greenwood testified that in August, 1873, she started from Erie to go to Harborcreek Station, seven miles east of Erie, on the defendants' road; she had missed the early passenger train and got on the way freight train; no one came around till she had got about two miles; the conductor then came; she offered him money, he declined to take it and asked for her ticket; she said she had none; he said he must put her off, he could not help it; he was obliged to put her off if she had no ticket; she had been accustomed to ride on that train back and forward, and always had paid her fare on the train; had ridden on it frequently after February 1st, 1873. She did not see the notice that passengers should not be carried on a freight train without a ticket.

Mr. Greenwood testified that he went with his wife to the depot, the ticket agent said the passenger train had gone, but the way freight was just going, starting from the upper end of the depot; he put his wife aboard there; the ticket agent did not say he needed a ticket; he had often ridden on the train without a ticket, did not know a ticket was required; he had not seen the notice in the depot that passengers would not be carried on freight trains without a ticket.

Plaintiff gave in evidence the following order from the company to their employees: —

"Conductors of *way freight trains* must visit their cabooses immediately before starting from each station, and not permit any passengers to ride upon their trains except such as are provided with tickets. . . . Ticket agents will take pains to inform passengers of this order, so that the public may experience no inconvenience."

Defendants gave evidence that the notice was hung in conspicuous places in the ladies' and gentlemen's rooms in the passenger station at Erie, and had been put up a week or ten days before the order took effect; the notice was in the caboose when Mrs. Greenwood got on the train; the notice was in each of the waiting-rooms at Harborcreek Station.

The court charged: —

. . . "It has not been contended that the order, requiring all passengers on this train to procure tickets before getting upon the train, was not a reasonable and proper one, and within the power of the defendants to make. But she contends that the company had, before this, for a long time, been in the habit of carrying her, back and forth, between Erie and Harborcreek, and allowing her to pay her fare on the cars, and she had never seen a notice or been informed of the new rule; and her husband testifies that, although the ticket agent at Erie told him he could take this way freight, he did not inform him that he must procure a ticket for his wife or himself before getting into the car, and that he was, therefore, justified in getting on the car without a ticket, and that the conductor should have received her fare, and carried her to her destination. We are of the opinion that, if the company had been in the habit of carrying the plaintiff on this train without a ticket, its agents had no right to eject her from the car, unless she had notice of the change of the rule. It matters not how she had that notice, if she did have it before she went upon the train, the conductor had a right to put her off, using as much force as was necessary for that purpose, and putting her off in a reasonably proper place." . . .

Both parties submitted points. The foregoing portion of the charge sufficiently states the principles involved in them and the question decided by the Supreme Court.

The verdict was for the plaintiffs $125.

The defendants took a writ of error, and assigned for error the instruction of the court.

Judgment was entered in the Supreme Court, November 1st, 1875.

Per CURIAM.— The rule as to the purchase of tickets before entering into the car of the way freight train was entirely reasonable. But the plaintiff having used this car often before the adoption of the rule, and indeed afterwards, without objection for the want of a ticket, the company could not turn her out of the car and land her off a mile or so from the station without proof of express notice, or her actual knowledge of the existence of the rule forbidding any one to enter the car without a ticket. The putting up such notices in the station house is not sufficient under these circumstances to visit her with notice.

Judgment affirmed.[2]

[2] Compare Johnson *v.* Concord R. R. Corp. (1865), 46 N. H. 213; Sears *v.* R. R. Co. (1867), 14 Allen, 433; Lane *v.* R. R. Co. (1880), 5 Lea (Tenn.), 124; Van Camp *v.* Mich. Cent. R. R. Co. (1904), 137 Mich. 467; Geer *v.* R. R. Co. (1905), 142 Mich. 511.

LOUISVILLE AND NASHVILLE RAILROAD *v.* TURNER.

100 Tenn. 213. 1897.[1]

WILKES, J. This is an action for damages for unlawfully ejecting the plaintiff, Turner, from one of the passenger cars of the Louisville & Nashville Railroad Company. It was commenced before a justice of the peace, and on appeal was tried before the court and a jury, and judgment rendered for the plaintiff for $300 and costs; and the railroad company has appealed and assigned errors.

The facts are that plaintiff bought what is called a "local ticket" at Guthrie, Ky., for Clarksville, Tenn. Upon its face was stamped or printed the words, "Good for one continuous passage, beginning on date of sale, only." And the date of sale, "June 14/97," was stamped on its back. Plaintiff did not use or attempt to use the ticket upon the day of sale, being unexpectedly detained at Guthrie on business. On the next day he tendered the ticket for passage to Clarksville. The conductor took the ticket in his hand and punched it, and handed it back to plaintiff, with the remark that he could not ride upon it, that the rule of the company was that such ticket was good only on the day of sale, and that he would have to pay fare or get off the train. Plaintiff replied that he had bought the ticket and paid full price for it, and was entitled to ride upon it, and had no notice of such rule; that he had no money to pay his fare, and would not willingly leave the train, but would have to be put off. At the next station the conductor took him by the arm and led him through the car, and put him off, without any actual force or rudeness. He walked down the railroad three or four miles, and, finding a conveyance going to Clarksville, went in it, reaching that city without further cost about 4 o'clock P. M., when by the train he would have reached there at 11 A. M. of the same day. Plaintiff states that he had no knowledge of the regulation of the road that a ticket must be used on the date of its sale, and had previously ridden upon tickets on days subsequent to the day of sale. It appears that about January 1, 1897, the railroad company had put this rule in force, and had posted notices of it in its various waiting rooms, and among others one was posted near the ticket window at Guthrie. This notice was as follows:

"Louisville & Nashville R. R. Co. Notice. On and after Jan. 1, 1897, local tickets sold by this company, except commutation and

[1] A small part of the opinion dealing with the measure of damages is omitted.—ED.

mileage tickets, will be void if not used for continuous passage through to destination, beginning on date of sale. Any ticket which cannot be thus used will be redeemed from the original purchaser, if sent to the general passenger agent, at Louisville, Ky., with satisfactory explanation of the cause which prevented its use." Signed by the traffic manager and general passenger agent. This notice was thus posted continuously from the date it went into effect, about January 1, 1897, up to the date of trial; and all local tickets sold after January 1, 1897, had stamped or printed on their face the provision above stated,—"Good for one continuous passage, beginning on date of sale, only." It is not shown that any special damage was done the plaintiff, beyond the indignity of ejecting him from the train, and the inconvenience to which he was put on his journey. Many errors are assigned, but we will not treat them *seriatim*.

The court charged the jury, in substance, that such a regulation and limitation in regard to tickets as the one in controversy would not be binding on a purchaser, unless the contents and conditions were made known to him when he bought the ticket, or it be shown otherwise that he knew of them, and purchased the ticket with that knowledge; that, in order to charge him with notice, it must be shown that he actually knew of them and consented to them, and the railroad company would be liable, if he bought a ticket without such actual knowledge, and attempted to use it, and was ejected from the train; that the fact that the notice was posted up in the waiting room, near the ticket window, and that the limiting words were stamped or printed on the face of the ticket, would not affect a purchaser with notice, if he bought the ticket in the usual way, and paid the usual price for it, and, if ejected for the refusal to pay fare while tendering such ticket, the road would be liable. This holding and ruling of the court is assigned as error, and it is also assigned as error that there is no evidence to support the verdict, and that the damages are excessive. It is held by this court that a railroad company may make, and by its agents enforce, reasonable rules and regulations for the carriage of freight and passengers, and the transaction of its business generally. Summit *v.* State, 8 Lea, 413; Lane *v.* Railroad Co., 5 Lea, 126; Railroad Co. *v.* Garrett, 8 Lea, 438; Railroad Co. *v.* Fleming, 14 Lea, 129; Railroad Co. *v.* Benson, 1 Pickle 627. As to whether a rule is reasonable or not is a question for the court. Railroad Co. *v.* Fleming, 14 Lea, 128. But such rules and regulations must be reasonable in their requirements, and must be executed in a reasonable and proper manner, so as not to be unnecessarily burdensome to the public. Such rules must not contravene

any law or principle of sound public policy, and they must accord with the proper service and conduct of a railroad in its business and duty as a common carrier. The liability of the road cannot be restricted by such rules and regulations, nor can they be so shaped or enforced as unnecessarily to annoy and restrict the traveling public in its rights. 5 Am. & Eng. Enc. Law (2d Ed.) p. 482, and notes. Thus, in Lane *v.* Railroad Co., 5 Lea, 124, it was held that a railroad company has the right to make regulations requiring passengers to purchase tickets before entering upon a freight train, and authorizing conductors to expel persons not having tickets, though they offer money in payment of fare. In Summit *v.* State it is held that a railroad may make all necessary reasonable rules for the proper and orderly management of its depots and other places open to the public, but not in such way as to infringe upon the rights of the public. A railroad may also make a rule that coupons from tickets shall be detached only by the conductor, and not by the passenger, and enforce such rule in a reasonable manner. Railroad Co. *v.* Harris, 9 Lea, 180. So a railroad may by regulation establish a higher rate of fare if paid on the cars than in the case of a ticket purchased before going on the train. Railroad Co. *v.* Guinan, 11 Lea, 98. It may also regulate the running of its trains, and the stopping of through trains at principal points only, and require passengers who are destined to way stations to ride upon such trains only as under the schedules stop at such stations. Trotlinger *v.* The E. T. & Ga. R. R., 11 Lea, 533. It may also require a person, on entering a train for purposes of travel, to exhibit his ticket, and afterwards to surrender it when called upon by the conductor. Railroad Co. *v.* Fleming, 14 Lea, 129. It may also prescribe in what cars passengers may ride, provided equal and proper accommodations are furnished alike to all passengers holding first-class tickets, as that cars may be set apart for ladies when alone or accompanied by gentlemen traveling with them, and different cars for colored and white people shall be furnished, under the statute. Railroad Co. *v.* Benson, 1 Pickle, 627; Railroad Co. *v.* Wells, 1 Pickle, 613. Such rules and regulations, in order to be effective, must be made known to the public in such way and by such means as in the special case may be necessary and best adapted to serve the convenience and purpose of the passenger as well as of the railroad.

As to what notice or publication of rules is required or sufficient, in order to reach and affect the public, the authorities are by no means agreed. From the very nature of the case, much must depend upon the provisions of the rule, and whether it is one intended to affect the entire public and the usual and general business of

passenger traffic or one intended for certain trains and certain circumstances and individuals only. To illustrate, a person desiring to ride upon a freight train, or a through train when his destination is a way station, would reasonably expect regulations different from those affecting travel generally, and would be put on his guard to ascertain the rules by which his passage must be governed, when he would have no occasion to suspect such rules to apply to his passage upon the trains of the road generally. A rule relating to the former might be reasonable, which would not in the latter case, and notice might be sufficient in the former which would not be in the latter.

So, in Lane *v.* Railroad, 5 Lea, 124, it was held that when a railroad company has been in the habit of permitting persons to ride upon its freight trains without the purchase of tickets, it must inform persons personally that its rule has been changed so as to require tickets, if such is the case, until such time as will suffice to acquaint the public with the existence of such rule.

So, in Trotlinger *v.* Railroad, 11 Lea, 533, it was held that a passenger holding a ticket to a way station had no right to ride upon a through train which did not stop at such station, provided he had notice of such schedule regulations, and it was suggested that if such publicity had been given in the ticket office and on the cars by posters that a party of ordinary intelligence, by the use of ordinary care and caution, could or might obtain all requisite information as to the matters involved, then the passenger would be bound by such regulations. Citing 2 Wait's Actions and Defenses, 67, and cases there collated, for authority for the latter proposition as to publication and notice.

These regulations in regard to riding on freight trains, and on trains only that stop at certain stations and do not stop at others, have been held to be reasonable regulations, but they apply to only exceptional cases, and not to the general traveling public in passing over the road from one station to another. Such special cases may be regulated by rules, and such rules may very properly be brought to the knowledge of the traveling public by notices of publication, but a rule and notice which is intended to apply to all passengers, and to affect all travel and every individual who applies for passage, stands upon a different basis and requires more direct notice. A notice which is intended to apply to the entire public should be such as to leave no doubt but that it reaches all who are to be affected by it.

While there is a conflict in the cases, the weight of authority is that time limitations, or conditions stamped or printed upon the back or face of a general ticket, are not binding upon a passenger

unless his attention is called to them when he purchases the ticket and he assents thereto. Potter *v.* The Majestic, 23 L. R. A., 746, and note; Ray's Negligence of Imposed Duties of Passenger Carriers, 514, 518; 4 Elliott on Railroads, Sec. 1593, note; Cole *v.* Goodwin, 32 Am. Dec., 505, and notes; Rawson *v.* Penn. Railroad Co., 8 Am. Dec., 545.

While there may be some uncertainty, and even conflict, in the authorities, we are of the opinion that the correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which, under the proper and usual schedules of the road, stops at the point of the passenger's destination. If a ticket, limited or conditional, is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration, or with the alternative presented to the passenger of a full and unlimited ticket. A similar rule obtains in regard to contracts for carriage of freight, and it has been held by this Court that a carrier must hold itself in readiness to ship with common law liability, and must offer to shippers a reasonable and *bona fide* alternative between that mode of shipment and one with restricted or limited liability. Railroad *v.* Gilbert, Parkes & Co., 4 Pickle, 430.

So, in Michigan Central Railroad *v.* Mineral Springs Mfg. Co., 16 Wall., 330 (Book 21, L. Co-op. Ed., 302), it is said: "Nothing short of an express stipulation, by parol or in writing, will be permitted to discharge a carrier from the duties which the law has annexed to his employment, . . . and such agreement is not to be implied or inferred from a general notice to the public limiting the obligation of the carrier, which may, or may not, be assented to." See, also, Nav. Co. *v.* Black, 6 How., 344.

We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket, for ordinary and general use, will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place in the crowd at the ticket window, produces and hands over his money with a request for a ticket to destination. His money is received. The ticket is produced, and, after being stamped, is handed to him through the ticket window. He has had no opportunity to see what

is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back, and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contract, and are not intended to do so. They are mere tokens to the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards, and it would impose quite a serious burden upon travel to hold that the public must read all these notices thus posted, before taking passage on a train upon which they are willing to, and do, pay full fare. Rawson *v.* Penn. R. R. Co., 8 Am. Rep., 545; Cole *v.* Goodwin, 32 Am. Dec., 505, and note; Ray Passenger Carriers, Sec. 145; Hutchinson on Carriers, Secs. 246, 580, 581; 4 Elliott on Railways, Sec. 1593.

This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains with limitations and conditions, such as excursion, round-trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket.[2]

[2] Compare McRea *v.* Wilmington & W. R. R. Co. (1883), 88 N. C. 526.

MARONY *v.* OLD COLONY & NEWPORT RAILROAD CO.

106 Mass. 153. 1870.[1]

THE plaintiff bought a ticket for passage from Sandwich, Massachusetts, to New York. It was also in evidence, that he took the morning train on the Cape Cod Railroad, giving the conductor for his passage the first part of the ticket, and arrived at Middleborough, the point of junction with the old line of the Old Colony & Newport Railroad, about nine o'clock, and there entered a train of the defendants' cars, and was carried to Fall River, the conductor of this train, to whom he presented this ticket, punching the same, and allowing him to pass thereon; that at Fall River, after a short delay, he entered another train of the defendants' cars, being the morning train from Boston to Newport, which came to Fall River by way of Taunton, and not by way of Middleborough; and that between Fall River and Tiverton, being called upon for his fare by the conductor of the last named train, he presented the ticket, and was informed by the conductor that by the rules of the defendants it was good only on the steamboat trains, or trains connecting with the steamboats, of which two were run in the afternoon, and that he must pay the difference in fare (about sixty cents) or leave the train at Tiverton, the next station, and wait for the steamboat train, which passed in the afternoon; that the plaintiff refused to make any further payment, claiming that on said ticket he was entitled to ride to Newport on said train, pass a part of the day in Newport, and then take the steamboat in the evening for New York; that at Tiverton he was removed, or required to leave the train, by the conductor; and that he subsequently jumped upon the train, rode to the next station, Bristol Ferry, there left the train, and some six or seven hours later took the steamboat train at Bristol Ferry, and reached Newport before the departure of the steamboat for New York; that the fare at this time, by reason of competition with other lines, was less from Sandwich to New York than the fare from Sandwich to Newport, of which the plaintiff was informed; that the tickets in the form above described were prepared and issued by the Cape Cod Railroad Company, and had been sold for some months prior to July 11, 1868, by said company, with the assent of the defendants, but the Cape Cod Railroad Company claimed no other right to make contracts for conveyance of passengers over the defendants' railroad; and that of the amount received for such tickets the Cape Cod Railroad

[1] Part of the statement of facts, the arguments of counsel and a paragraph of the opinion dealing with a point of evidence are omitted.— ED.

Company retained the local fare on its own road, and paid the defendants the amount of the fare from Middleborough to New York, and the ticket-seller at Sandwich was appointed by, accounted to, and received all instructions from said Cape Cod Railroad Company.

The defendants offered evidence, which was uncontradicted, that by their rules passengers holding tickets to New York were restricted to the steamboat trains; that two steamboat trains were run each afternoon, to one of which cars passing through Middleborough were attached, and stopped at Tiverton; and that the morning train from Boston to Newport was not one of said steamboat trains.

WELLS, J. The plaintiff's ticket entitled him to a passage upon any regular train for passengers upon the road of the defendants. It contained no notice of any restriction or limitation of the right which it purported to give. It was issued by the ticket agent of the Cape Cod Railroad Company, whose authority for that purpose was sufficiently shown by the fact that such tickets had been so issued by said company "for some months prior" thereto, "with the assent of the defendants." The defendants could not, by any rule or regulation not previously made known, restrict the plaintiff from taking the passage to which his ticket entitled him, in any regular train for the accommodation of passengers. Under the instructions, the jury must have found that there was no such information to the plaintiff personally; and the case shows no such publication of the rule as would affect him with notice thereof.

We think that the defendants show no good ground of exception to the ruling or the instructions to the jury in the court below.

Exceptions overruled.

WEBBE *v.* WESTERN UNION TELEGRAPH CO.

169 Ill. 610. 1897.[1]

MR. JUSTICE MAGRUDER delivered the opinion of the court.

Upon the blank form containing the telegraphic message delivered by Haas to appellee's operator at Montgomery, Ala., there were printed in small type certain conditions, among which was the following: "The company will not hold itself liable . . . in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." Upon the back of the blank form upon which the dispatch as de-

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

livered to appellant in Chicago was written, certain stipulations and conditions were printed, the last of which was as follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." It is contended by appellee that the claim here sued upon was not presented in writing within the 60 days named in the printed conditions. It is not altogether clear, under the evidence in this case, that the claim was not presented in writing within 60 days, as required by the condition. On February 7, 1893, one of the attorneys of the appellant wrote a letter to an officer of the appellee company. Although this letter stated that the claim for damages was made against appellee on behalf of I. H. & J. C. Haas, yet the letter explained fully the nature of the alteration which was made in the dispatch, and the nature of the claim based upon the loss incurred by reason of that alteration. But, whether the claim was presented in writing within the 60 days or not, it seems to be conceded that the action of the court in instructing the jury to find for the defendant was based upon the conclusion that the claim was not presented in writing within the time named.

The question in the case is whether the court erred in taking the case away from the jury. The further question involved is whether the failure to present the claim in writing within the 60 days, if there was such failure, constitutes a defense against the present action. It is not denied that the company was guilty of negligence in delivering the dispatch as altered, instead of delivering it as originally sent. At any rate, no contest is made upon the question as to whether there was such negligence or not. Counsel for appellee confine themselves in their brief to the proposition that, for want of a claim in writing within 60 days after the dispatch in question was sent, appellant's right of recovery is barred. It is to be noted that this suit is not brought by Haas, the sender of the dispatch, but by Webbe, the receiver of the dispatch as changed. The dispatch, as sent, is signed by the sender; but the dispatch, as received, is not signed by the receiver. The question, then, arises whether any difference exists between the right of recovery by the sender of the dispatch and the right of recovery by the receiver of the dispatch, so far as these printed conditions upon the blank forms are concerned. We have held that the relation of contract exists between the sender of the dispatch and the telegraph company, but that no relation of contract exists between the receiver of the dispatch and the telegraph company, and that the proper remedy of the receiver of the dispatch for damages on account of its alteration is an action in tort. Telegraph Co. *v.*

Dubois, 128, Ill. 248. Ordinarily, where a shipper of goods or the sender of a telegraphic dispatch is held to be bound by stipulations or conditions printed upon the blank form of a receipt or bill of lading or dispatch, it is upon the ground that the person so bound signs the document containing the conditions, and makes a contract with the company which is to carry his goods or transmit his message. It would seem to be clear, however, that such conditions and stipulations would not have the same binding effect where, as here, no contract relation exists.

In a case where a suit in assumpsit for damages was brought by the sender of a dispatch against the telegraph company, we held that the telegraph company is a servant of the public, and bound to act whenever called upon, its charges being paid or tendered; that such companies are, in this respect, like common carriers, and though not regarded, like common carriers, as insurers of the safe delivery of every message intrusted to them, yet their duty is to transmit correctly the message as delivered; that they are bound to the use of due and reasonable care, and liable for the consequences of carelessness or negligence, in the conduct of their business; that where a party desiring to send a telegraphic dispatch is required by the company to write his message upon a paper containing a condition exonerating the company from liability for an incorrect transmission of the message unless it shall be repeated, and at an additional cost therefor to the sender, such a restriction, even if regarded as a contract, is unjust, without consideration, and void; that it is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence by contract; that notwithstanding any special condition which may be contained in a contract between a company and the sender of a message, respecting the liability of the former in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by its own fault; that it will depend on circumstances whether a paper furnished by the company on which the message is written, and signed by the sender, is a contract or not; that it is a question for the jury to determine, as a question of fact, upon evidence *aliunde*, and from all the circumstances attending the signing of the paper, whether or not the sender of the dispatch has knowledge of its terms and assents to its restrictions. Tyler, Ullman & Co. *v.* Western Union Tel. Co., 60 Ill. 421. The Tyler case distinctly held that assent by the sender of the dispatch to the printed terms and conditions upon the blank form must be shown in order to make such terms and conditions binding as a contract upon the sender. The doctrine of the Tyler case has been subsequently indorsed and approved by this court.

Western Union Tel. Co. *v.* Tyler, 74 Ill. 168; Western Union Tel. Co. *v.* Dubois, *supra.* If assent to such terms and conditions is necessary to bind the sender of the dispatch, surely assent to such terms and conditions, as printed upon a dispatch delivered, will be necessary to bind the receiver thereof. The receiver of the dispatch will certainly not be bound by a provision thereon requiring a claim to be presented within 60 days, in the absence of proof that he assented to such a provision. Western Union Tel. Co. *v.* Fairbanks, 15 Ill. App. 600; Western Union Tel. Co. *v.* De Golyer, 27 *id.* 489; Western Union Tel. Co. *v.* Lycan, 60 *id.* 124. It is said, however, that the requirement that the claim should be presented within 60 days is a reasonable requirement, and that a party suing for damages will be bound to show that he has complied with such requirement, if he had notice or knowledge of the same, or if there were any circumstances of such a character as to affect him with such notice or knowledge. Upon an examination of the authorities, it will be found that in most cases where the provision in regard to the limit of 60 days has been held to be reasonable, and notice or knowledge of the same has been held to be binding upon the plaintiff in the suit, the controversy has been between the sender of the dispatch and the telegraph company. Such doctrine, however, has no application as between the receiver of the dispatch, whose suit is in tort against the company for negligence in the performance of a public duty, and the telegraph company. From the rule that assent is necessary to make such a condition as the 60-day limit binding, it necessarily follows that mere notice or knowledge of such condition will not affect the receiver of the dispatch. It is against public policy that a telegraph company may adopt rules, regulating its relations with its patrons, which, if they are reasonable, shall be binding upon such patrons without their assent, if they only have knowledge. Counsel for appellee refer to the case of Oppenheimer *v.* United States Express Co., 69 Ill. 62, as supporting the doctrine contended for by them; but "there is in that case [Oppenheimer Case] no departure from the uniform decisions of this court that a carrier cannot be released from the duties and liabilities annexed to its employment unless the shipper assents to the attempted restrictions." Boscowitz *v.* Adams Express Co., 93 Ill. 523.

Some of the cases seem to hold that the printed conditions upon blank forms of telegraphic dispatches, including the one in reference to the limit of 60 days, are mere regulations, and not contracts between the sender of the message and the telegraph company. The force of the distinction thus sought to be made lies in the fact that, if the conditions or stipulations are considered

as mere regulations, the assent of the sender to them is not necessary, but that he will be bound if they are brought home to his knowledge, whereas, if they are held to be parts of a contract, the assent of the sender must be shown in order to bind him. Croswell on Law of Electricity, § 493. But, whatever may be the correct view of these conditions as being regulations or contracts where the controversy is between the sender of the dispatch and the telegraph company, we are of the opinion that such distinction has no application where the controversy is between the company and the receiver of the dispatch. Id. § 540. There is no proof of contract between the telegraph company and the person to whom the message is addressed, and therefore he could not be held bound by these conditions or stipulations. Id. § 504, and cases cited in note 2.

Counsel for appellee rely mainly upon the case of Manier & Co. *v.* Western Union Tel. Co., 94 Tenn. 442, as authority for the position that such conditions and stipulations including the limit of 60 days, are binding upon the receiver, as well as the sender, of the dispatch. But we are not inclined to assent to the doctrine of the Tennessee case. The author of the opinion in that case refers to cases holding that the addressee of the message is not bound by the stipulation as to the 60-day limit, because he did not make the contract, and also to cases holding to the contrary, and says that it is not necessary to determine in the case there under consideration where the weight of authority lies. The conclusion announced in that case rests mainly upon two considerations, namely: First, that, where the receiver of the message is a patron of the company, he will be presumed to have knowledge of the form of the contract embodied in the blanks used; second, that the receiver's right to recover rests entirely upon the contract of sending, and upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right. We are unable to see that these considerations can have any influence where the action brought by the receiver of the dispatch is an action in tort for damages for the careless and negligent performance of a public duty.

The opposite view from that contended for by counsel for appellee is supported by respectable authority, and is in harmony with the decisions heretofore rendered by this court, and is a natural corollary from such decisions.[2]

[2] Compare Birney *v.* N. Y. & W. T. Co. (1862), 18 Md. 341; U. S. Tel. Co. *v.* Gildersleeve (1868), 29 Md. 232; Pearsall *v.* Western U. T. Co. (1891), 124 N. Y. 256.

CENTRAL OF GEORGIA RAILWAY CO. *v.* MOTES.

117 Ga. 923. 1903.[1]

SIMMONS, C. C. . . . 2. We shall not at this time undertake to do more than determine whether or not, as regards a waiting room in a city such as Macon, where weary travelers may, if they wish, procure suitable accommodations for rest and comfort, regulations forbidding the use by passengers of benches as beds, or any other attempted transformation of a railroad waiting room into a lodging house, tend to deprive passengers of inalienable rights, or are for any other reason to be regarded as despotic and unreasonable. It is pertinent here to remark that there was no evidence introduced on the trial touching any rule promulgated by the railroad commission of this state with respect to the duty of a common carrier to furnish lodgings to such of its patrons as find it convenient to present themselves at the carrier's depot during the night, there to remain until the scheduled departure several hours later of a morning train. Nor have we been cited to any common-law or statutory rule which imposes upon a railway company any such duty towards such patrons, or to one holding a ticket, who, through his own fault or misfortune, has missed an evening train. Accordingly, we shall endeavor to decide on principle whether such a duty does or does not, as a general thing, exist. It seems reasonable to assert that a railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting room until an hour or so before the departure, on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting room open all night for the accommodation of its patrons, permitting them to enter it at any time they chose, on condition that they would not abuse the privilege thus accorded them by undertaking to wrest from the carrier a night's sleep to which they were not entitled. Many good reasons might be suggested why the carrier would be unwilling to extend an unqualified invitation to enter at will and stay as long as desirable. For instance, passengers expecting to take a particular train might, if permitted to indulge in inopportune sleep, miss the train, and be left complaining on the carrier's hands, instead of making a timely and orderly departure and giving place to other passengers entitled to enter its waiting room and partake of the accommodations it afforded. Again, the carrier could have a laudable ambi-

[1] Only one point in the opinion is reprinted.— ED.

tion to so conduct its waiting room that passengers of culture and refinement might be spared the disgust of witnessing the uncouth and unseemly behavior of a different class of travelers, whose sense of decency fails to suggest to them the impropriety of sprawling over or upon benches or seats designed for a purpose other than that of affording an opportunity to retire for the night in a grotesque, if not offensive, attitude of repose. The reasonableness of a regulation adopted by a carrier of passengers with respect to the use to be made of its premises is not to be arbitrarily determined by applying the test whether or not such regulation would be reasonable if adopted by a carrier of live stock. The circumstances of time and place are to be given due consideration. On the Western frontier, years ago, the reasonableness of attempting to regulate the "shooting out" of station lights by waiting passengers might have been seriously questioned by at least some members of the traveling public. To-day there is doubtless a growing sentiment in all parts of the country against converting into a smoking apartment a general waiting room provided for the accommodation of both sexes, as well as against treating with contempt the invitation held out by the station house "sand box" or cuspidor, and other minor infractions of the laws of etiquette which obtain in polite society. The evolution which has taken place along this line cannot properly be ignored by the courts, for carriers of passengers are to be encouraged, rather than disheartened, when they manifest a disposition to improve conditions which have become almost intolerable. To furnish adequate and comfortable accommodations to the traveling public is an exacting and serious business, not mere vain and expensive trifling. A prospective traveler who purchases a railroad ticket with a view to going on a journey does not thereby acquire a right to demand of the carrier that he be allowed to enter its waiting room eight hours or so before the train he expects to take is due, and there go to sleep as a matter of course. To miss his train will not change his status from a waiting passenger into a guest entitled to demand a place wherein to sleep until the next train bound for his destination arrives, or transform the carrier into an innkeeper or proprietor of a lodging house. Indeed, he would stand upon no better footing than would a patron of a public eating house who, after missing his supper through his own tardiness, might, simply because he was the holder of a meal ticket, unreasonably claim the privilege of occupying a chair at table in the room where meals were served, and there passing his time in sleep until the arrival of the breakfast hour. Accordingly, we hold, without hesitation, that a railway company may with pro-

priety insist that such of its patrons as contemplate taking a morning train shall, if they desire to refresh themselves by slumber during the intervening night, find quarters other than its waiting rooms.

AMMONS *v.* RAILROAD.

138 N. C. 555. 1905.[1]

Action by W. R. Ammons against the Southern Railway Company, heard by Judge B. F. Long and a jury, at the August Term, 1904, of the Superior Court of SWAIN County. From a judgment of nonsuit, the plaintiff appealed.

The plaintiff alleges that he was unlawfully ejected from one of the defendant's trains, and sues to recover damages for the wrong thus committed. At the close of the testimony, and after the plaintiff had requested certain instructions to be given to the jury, the court held that he could not recover in the action. The plaintiff thereupon submitted to a nonsuit, and appealed. It is necessary to state only the substance of his testimony, which is as follows: On June 20th the plaintiff went to Almond, a station on defendant's line, to buy a ticket to Noland, which is nine miles away. The defendant's agent told him he was out of tickets, but to get on the train, and he would tell the conductor not to charge extra fare. The agent said the ticket rate was 41 cents. The extra or train rate was 65 cents. The agent said the plaintiff would have to pay only 41 cents. He boarded the train, and the conductor asked him for his ticket. The plaintiff told him what the agent had said to him, and the conductor demanded 75 cents, and said that the agent did have tickets. He then told the plaintiff to pay 75 cents or get off. He pulled the bell cord, when the plaintiff said, "If you put me off, I will sue the company," and the conductor replied, "It would not make a durn bit of difference to me if you did." When the conductor called for the fare, the plaintiff offered him 50 cents, and added that he did not mind a rebate, but did not want to pay 75 cents. The conductor refused to take the 50 cents, and put the plaintiff off the train 400 yards from the station. It is a rule of the company to require the payment of 25 cents extra when a passenger has no ticket. There was evidence as to the damages, not necessary to be stated.

WALKER, J. (after stating the case). Assuming the plaintiff's testimony to be true, and giving him the benefit of all reasonable

[1] One paragraph of the opinion is omitted.— ED.

inferences therefrom, and this is the way it should be considered, we think the judge erred in his intimation of opinion against the plaintiff's right to recover. The law of the case, at least in the present development of the latter, and in the aspect of it now presented, seems to be well settled, and is thus stated by a learned and accurate text-writer: "It is undoubtedly competent for a railroad company, as a means of protection against imposition, and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car; and where this requirement is duly made known, and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train, regardless of a tender of the fare in money, or by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured. A regulation or by-law of the carrier is not unreasonable which provides that when such tickets are not procured before the commencement of the journey, and the carrier is therefore put to the inconvenience of collecting from the passenger his fare during its progress, the price of the carriage shall be more than would have been charged for the ticket, and that upon the refusal of the passenger to pay the higher fare, not extortionate in amount, he shall be ejected. And if adopted in good faith, and with a view to facilitate the business of the carrier, there can be certainly nothing unreasonable or unjust in such rule, especially in the case of railway carriers. But, as a condition precedent to the existence of this right of expulsion for the refusal to procure a ticket or to pay the higher fare, an opportunity, at least reasonable, and such as the statute requires where a statute exists, must have been afforded by the carrier to the passenger, not himself in fault, to provide himself with the required ticket. If, therefore, no office be kept or opened at the proper time, nor adequate facilities be provided for the purpose of supplying passengers with them, or if the office provided for the purpose be closed before the time fixed by law or by a rule of the carrier, and for either reason the passenger has been unable to obtain a ticket, the higher rate cannot be lawfully demanded. And if, without having afforded such proper facilities to the passenger, the carrier should exact from him the additional charge for carriage without a ticket, the former may sue for and recover the amount so paid above the established rate when a ticket is purchased; and if, upon his refusal to pay it, he be ejected, when he is ready and offers to pay his fare at such established rate, his expulsion will be illegal, and he may recover damages for the trespass." Hutchinson on Carriers (2d Ed.) § 570 *et seq.*; 5 Am. & Eng. Enc. of Law (2d Ed.) p. 595, and note 4. These principles

are well sustained by the authorities cited in their support, and are in themselves most just and reasonable. They apply with peculiar force to the facts of this case.

The plaintiff's right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale to intended passengers. If he did not know it, and refused to accept and act upon the plaintiff's statement, no fault can be imputed to the plaintiff, and the defendant cannot escape liability, as the cause of action rests upon the fact that there was no opportunity afforded to purchase a ticket, and the plaintiff is not responsible, and cannot be made to suffer, for the conductor's ignorance of existing conditions. The defendant's station agent could easily have informed the conductor that his tickets had been exhausted, and actually promised the plaintiff to do so, so that in this case there was no excuse for a want of knowledge of the facts. It is sufficient to declare, in the light of the authorities and with the plaintiff's testimony before us, that he was entitled to have the case submitted to the jury under proper instructions from the court. Having so decided, we need not discuss the question of damages. The subject, though, has recently been considered by this court in the following case: Holmes *v.* Railroad, 94 N. C. 318; Rose *v.* Railroad, 106 N. C. 168; Tomlinson *v.* Railroad, 107 N. C. 327; Allen *v.* Railroad, 119 N. C. 710; Remington *v.* Kirby, 120 N. C. 320. There was error in the ruling of the court that the plaintiff upon his own showing was not entitled to recover.

New trial.[2]

TOWNSEND *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.

56 N. Y. 295. 1874.[1]

GROVER, J. This action was brought by the plaintiff to recover damages for an assault upon and forcibly ejecting him from its car, at Staatsburg, a station on defendant's road between Poughkeepsie and Rhinebeck.

[2] See Chase *v.* N. Y. Cent. R. R. Co. (1863), 26 N. Y. 523; Mills *v.* M. K. & T. Ry. Co. (1900), 94 Tex. 242.
As to exhibition of ticket on train, see Hibbard *v.* N. Y. & Erie R. R. Co. (1857), 15 N. Y. 455.
As to refusal to surrender ticket without receiving a check, see State *v.* Thompson (1850), 20 N. H. 250.
As to regulations with regard to carrying of parcels by passengers, see Morris *v.* Atlantic Ave. R. R. Co. (1889), 116 N. Y. 552; Bullock *v.* Del., L. & W. R. R. Co. (1897), 60 N. J. L. 24.

[1] The arguments of counsel and part of the opinion are omitted.— ED.

The jury by their verdict have found that the plaintiff purchased a ticket at the station at Sing Sing, for Rhinebeck; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie; that after this train passed Peekskill the conductor called for tickets and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant; nor did the plaintiff ask for a return of his ticket or for any such evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in a car in this train; and after it started the conductor called upon him for his ticket; in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had taken and had not given back to him; some of the passengers told the conductor that the plaintiff had had such a ticket. The conductor told the plaintiff that it was his duty in case he had no ticket to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or to leave the train upon request, was taken hold of and such force used as was necessary to overcome his resistance, and ejected from the car. This was the injury for which the recovery was had.

In Hibbard v. The New York and Erie Railroad Co. (15 N. Y., 455) it was held by this court that a railroad company had the right to establish reasonable regulations for the government of passengers upon its trains, and forcibly eject therefrom those who refused to comply with such regulations. Surely, a regulation requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for non-compliance therewith such passenger may be excluded from the car. The question in this case is whether a wrongful taking of a ticket from a passenger by the conductor of one train, exonerates him from compliance with the regulation in another train, on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking

his ticket he has a complete remedy against the company. The conductor of the train upon which he was was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor of the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was rightly held by the trial judge, by putting the plaintiff off, in case he persistently refused to pay fare. The question is, whether under the facts found by the jury, resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented, where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had the right to repel force by force and use all that was necessary to retain his seat in the car. Thus, a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train, in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy, without inviting the commission of an assault and battery by persisting in retaining a seat upon another train in violation of the lawful regulations by which those in charge were bound to govern themselves. It was conceded by the counsel, upon the argument, that one buying a ticket, say from Albany for Buffalo, which was wrongfully taken from him by a servant of the company, and who had once been put off for a refusal to pay fare, would not have the right to go upon other trains going to Buffalo, and if forcibly ejected therefrom maintain actions against the company for the injuries so inflicted. The reason why he could not, given by the counsel, was, that being once ejected was notice that he could not have a seat upon the ticket which he claimed had been taken from him. But when the conductor in charge of the train explicitly tells him that he cannot retain his seat upon that ticket, that he must pay fare or leave the car, does it not amount to the same thing? He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail

himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.[2]

BURGE *v.* GEORGIA RAILWAY AND ELECTRIC CO.

133 Ga. 423. 1909.[1]

HOLDEN, J. The plaintiff brought suit against the defendant, a corporation operating a system of street railways in the city of Atlanta, for damages, alleging that on the 22nd day of September, 1906, he, in company with his brother and another party, boarded one of the defendant's cars in the city for the purpose of riding thereon to the center of the city. He tendered to the conductor a $5 gold piece and asked him to take out three fares. The conductor replied that he could not change the money, and that the petitioner and his two companions must leave the car. The conductor forcibly ejected the plaintiff from the car. The defendant proved that there was in operation a rule of the defendant company, requiring its conductors to make change where the amount tendered was not above $2, but not to furnish change for a greater amount for passengers.

. . . . . .

2. The only other point referred to or insisted upon by counsel for the plaintiff is that the plaintiff had the right to have the jury pass upon the question as to whether or not the conductor should have accepted a $5 gold piece and made change thereof in order to pay three fares. It would not be right to require conductors to carry such an amount of small change as would be necessary to change any denomination of money, nor would it be proper to require passengers to tender the exact amount of fare; hence, the law requires that the conductor go prepared to change an amount that is reasonable. Street railways have the right to enact a reasonable rule in regard to such matters, so as to fix an amount which conductors are required to carry and which the public may expect them to carry for the purpose of supplying change to passengers. In this connection, see Southern Ry. Co. *v.* Watson, 110 Ga. 681

[2] See Bradshaw *v.* South Boston R. R. Co. (1883), 135 Mass. 407; Kiley *v.* Chic. City Ry. Co. (1901), 189 Ill. 384.

[1] Part of the opinion is omitted.— ED.

(36 S. E. 209); 6 Cyc. 545. The rule in the present case was one requiring conductors to carry change to the amount of $2 and no more. Whether or not such a rule is a reasonable one is a matter of law to be determined by the court. Southern Ry. Co. *v.* Watson, 110 Ga. 681, 682 (36 S. E. 209); Central of Ga. Ry. Co. *v.* Motes, 117 Ga. 923 (43 S. E. 990, 62 L. R. A. 507, 97 Am. St. R. 223). The public, as well as the corporation, are interested that some fixed rule should exist, and it is proper that it should be a question of law whether the rule is a reasonable one. What might appear reasonable to one jury might not so appear to another; and if it were a question of fact to be determined by a jury, no fixed rule by which the corporation and the public should be governed could exist. To require conductors to carry an amount sufficient to change $5 for all passengers who might tender that amount to pay the fare charged for transportation within the city would require all conductors, at all times, to carry a considerable amount of change. To require conductors to obtain, count out, and deliver change for $5 for every passenger who might tender that amount would make slow the collection of fares, with the probable result of delaying the progress of cars and subjecting the traveling public to the inconvenience of frequent waits and delays made necessary by the changing of such a denomination of currency. Such a requirement might not only result in great inconvenience to the public, but impose a heavy and unnecessary burden on the railway company. Every street-railway company should discharge its duties to the public in a proper manner; and in order to do so, it has a right to make and enforce reasonable rules. To require conductors to change $5 for every passenger tendering that amount would prevent the company from performing its public duty with proper caution and with proper expedition. The rule requiring conductors to change no amount greater than $2 works no great hardship on the passenger, though a rule requiring the changing of larger amounts might prove very burdensome to the company. The fact that the plaintiff asked that the fares of his two companions be also taken out of the $5 coin tendered does not place him in any better position than if only one fare was to be taken out, since the amount of change which the conductor would be required to furnish in order to collect the three fares or the fare of the plaintiff alone would still be greater than $2. The rule of the street-railway company, requiring conductors to make change to the extent of $2 and no more, is a reasonable rule, and the court committed no error in so holding. Wynn *v.* Ga. Ry. & Elect. Co., 6 Ga. App. 77 (64 S. E. 278); Barker *v.* Central Park, N. & E. River Co., 151 N. Y. 237 (45 N. E. 550, 35 L. R. A. 489, 56 Am. St. R.

626); Muldowney *v.* P. B. Traction Co., 8 Pa. Sup. Ct. 335. The court below was right in directing a verdict, and its judgment is

Affirmed. All the Justices concur.[2]

SHIRAS *v.* EWING.

48 Kan. 170. 1892.[1]

OPINION by STRANG, C.: Action for damages. The plaintiff, who was also plaintiff below, a resident of the city of Ottawa, in this state, contracted with the Cherryvale Water & Manufacturing Company for a supply of water for the purpose of sprinkling his lawn, the use of the water to be regulated by the rules and regulations of the water company. The defendant, C. T. Ewing, the assignee and successor of the water company, by his agent, the manager of said water company, for the alleged violation of the rules and regulations of said company by the plaintiff, Mr. Shiras, in the use of the water supplied him by said company, shut off his supply of water for the period of about two months from August 10, 1887. The plaintiff alleged that the defendant unlawfully shut off his supply of water, and that because of the withdrawal thereof a number of his shade-trees died, and the grass on his lawn also died out. For these he claimed damages. The case was tried by the court and a jury, resulting in a verdict and judgment for the defendant. Motion for new trial was heard and overruled.

The company in this case made rules for the regulation of the use of the water supplied by it to its patrons. The contract of the plaintiff with the company was made subject thereto, and the plaintiff was furnished with a copy of such rules before the violation thereof complained of, and for which his water was shut off, occurred. The evidence tends to prove that the plaintiff violated them. The jury found against him, and in so finding determined that he did violate them. The court found that the rules of the company were reasonable. We do not desire to say whether as a whole they are reasonable or not. The evidence strongly tends to show that the plaintiff's washer, whence he got his supply of water, was left open all night, and the water was left to run to waste. We think the jury found that it was left to run to waste. The company presented the plaintiff a bill for the water so wasted. He refused to pay it. The bill, which was first $3, was afterwards reduced to $1.50, and still he refused to pay it.

[2] See Barker *v.* R. R. Co. (1896), 151 N. Y. 237; Knoxville Traction Co. *v.* Wilkerson (1906), 117 Tenn. 482.

[1] Part of the opinion is omitted.— ED.

His refusal was not based upon the idea that the bill was too high, because he said he would not pay anything for the water so wasted. It is true he claimed it had not been let to run to waste by himself, nor by his permission. But, under the evidence as to the negligent and careless use of the water by the plaintiff, it was not difficult for the jury to believe that the washer was left open by the negligence of himself or his family. Under the instructions of the court upon that question, and a general verdict for the defendant, it is undoubtedly true that the jury so found. A rule of the company against the unnecessary and useless waste of the water supply is certainly reasonable.

This is all we hold in this case. This requires this court to affirm the judgment of the district court herein, and we therefore so recommend.

By the Court: It is so ordered.

All the Justices concurring.[2]

SHEPARD *v.* THE MILWAUKEE GAS LIGHT CO.

6 Wis. 539. 1859.[1]

SMITH, J. The only reason urged for refusing to furnish the gas to the plaintiff was, that he refused to sign the regulations adopted by the company. This leads us to examine those regulations, and to determine whether or not they were such as the company could rightfully require the plaintiff to subscribe to, as a condition precedent to his right to demand the gas.

We shall not attempt to discuss all of these regulations, separately, though we are requested so to do; but shall only point out some of them which we think are unreasonable, and which the company had no right to impose. But before doing so, we wish to be distinctly understood, that in our opinion, they have a right to make all such needful rules and regulations for their own and the convenience and security of the public, as are reasonable and just, and to exact a promise of conformity thereto. But these rules and regulations must be reasonable, just, lawful, not capricious, arbitrary, oppressive or unreasonable. Were it not so, the whole net work of pipes and machinery would be at the mercy of the careless, the fraudulent or the malignant. From the nature of the article produced and used, as well as from the manner of its use, great care is requisite in its management, and there is a

[2] See Watauga Water Co. *v.* Wolfe (1897), 99 Tenn. 429.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

kind of implied duty or obligation resting upon those who use the gas, to use it in such a manner as not to injure or endanger others who use it. Hence we see no objection to a rule or regulation of the company requiring application for gas to be made in writing, and requiring the applicant to sign reasonable regulations.

The 3rd rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just and necessary to guard against loss. As the delivery of the gas is necessarily its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it without reasonable security for payment, in convenient amounts and at proper periods.

The 9th rule is also objected to as illegal. This authorizes the company, by their inspector, to have free access at *all times* to buildings and dwellings, to examine the whole apparatus and for the removal of the meter and service pipe.

The gas apparatus in the buildings, stores and dwellings, is the property of the individual, put up at his own expense, in which the company have no interest. It may be proper for the company to have the right of inspecting the gas apparatus to determine its sufficiency and safety and, at stated periods, to inspect the same, or perhaps oftener, upon reasonable notice therefor. But certainly it cannot be necessary that the dwellings of gas consumers should be subject to instantaneous visitation at all times without notice. Nor is it to be conceded that the company should have the right, at all times, to enter the premises and remove the service and meter at their pleasure. This regulation is too general and cannot be upheld, or at least a party cannot be required to subscribe to it to entitle him to be furnished with gas.

Another regulation (14) reserves to the company the right at any time to cut off communication of the service pipe, if they shall find it necessary so to do, to protect the works against abuse or fraud. Here the company assume the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. Much less could it have been the intention to confer such power upon one of the parties to a contract of such vital importance. It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud, as the law provides for individuals.

Rule 16 provides, that after the admission of gas into the fittings,

they must not be disconnected or opened, either for alteration or repairs, or extensions, without a permit from the company, which may be obtained at their office, free of expense; and any gas fitter or other person, who may violate this regulation, will be held liable to pay treble the amount of damages occasioned thereby.

It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular, if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so, and not him only, but upon any other person who should act in the matter without their consent. The statement of this proposition is its answer.

Rule 17 provides, that the company shall have the right to substitute alcohol for water in the meters, and charge therefor. All that is necessary to observe upon this regulation, is, that the company are entitled to charge for the gas consumed, and that some accurate mode of measurement must be used, whether of alcohol or water. The consumer must pay the legal rates for the quantity consumed; and the mode of measurement, whatever it is, must be correct.

Rule 21 assumes for the company the power to make any other rules or regulations, from time to time, under which the gas company will furnish private consumers, as experience shall suggest, &c.

What we have said before as to the power of the company to prescribe *reasonable* rules and regulations, is a sufficient answer to the question raised, or which may be raised thereon.

It is not necessary to go farther. Indeed we might have stopped much earlier, and would have done so, but for what we understood to be the desire of the parties for a full examination of all the questions involved in this action.

Without recapitulation, we have no doubt that the judgment of the county court was right, and that the judgment ought to be, and it is affirmed, with costs.

WESTERN UNION TELEGRAPH CO. *v.* TROTTER.

55 Ill. App. 659. 1894.

MR. PRESIDING JUSTICE WALL delivered the opinion of the Court.

Appellee recovered a judgment against appellant for $134.09 for failing to deliver a telegram addressed to him by a commission firm in Chicago. Appellee was a farmer, residing a mile and a quarter from the village of Kansas. Having some marketable cattle which he wished to sell he wrote to the commission firm for information and they sent him the telegram in question. They did not know whether he lived in the village or what arrangements he might have made for having a telegram delivered to him and paid merely for its transmission to Kansas. The operator did not know the appellee but made effort to find him within the village and failed to do so. He learned, however, where he lived, and it being beyond the free delivery limits, did nothing further. The appellant having heard in some indirect way that there was a telegram for him, called at the office and received it. In the meantime, not having heard from this commission firm, he had sent his cattle to another firm.

The claim is that if he had received the telegram promptly he would have sent the cattle in response thereto by the first train and would have realized a higher price than that received. The verdict represents the alleged difference. The telegram was received at Kansas at 1:10 P. M., July 5, 1892. It did not reach the hands of appellee until the 9th.

It appears that by a rule of the company the free delivery limit for a town of less than 5,000 inhabitants was one-half mile from the office.

It is urged on the one side that this is a reasonable rule and that it should be enforced, and on the other that whether reasonable or not it does not appear that the sender or the appellee knew of it, and so it is not binding on either. The rule is reasonable, and not only so, but it is a matter of common knowledge among business men that there is always a limit for the free delivery of messages.

The trouble here was that the appellee did not expect a reply by wire. He went to the post office daily, but as he had not instructed the commission men to telegraph him it did not occur to him that they would, and they not knowing that he lived beyond the limit, made no arrangement with the company for delivery of the message. Hence it was bound to do no more than it was

paid for, that is, transmit the message to the designated office and there make reasonable effort to deliver it within the free limit.

It is argued that the agent should have known from its terms, that it was a message of importance, but this did not require him to go beyond the limits of free delivery. If he inferred that the message was of unusual importance, he must also have inferred that the appellee was expecting it, and not living within the limits, would call for it. At any rate, such a conclusion on his part would have been reasonable.

We are of the opinion that the case shown by the proof did not justify the judgment, which will therefore be reversed and the cause remanded.[1]

CAMPBELL *v.* WESTERN UNION TELEGRAPH CO.

74 S. C. 300. 1906.[1]

Mr. Justice Gary. This is an action for damages for failure to deliver a telegram within a reasonable time.

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The next question for consideration is, whether the Circuit Judge was in error, in ruling that when a person to whom a message is addressed, resides within a reasonable distance from the company's office, though not within the free delivery limits, it cannot refuse to deliver the telegram, unless it demands additional compensation from the sender, and he declines to pay it. In other words, that it is the duty of the defendant to notify the sender, it would not deliver the message, unless he made additional compensation for the service beyond the free delivery limits. The defendant is a common carrier in its line of business (sec. 3, art. IX., of the Constitution), and the law imposes upon it the duty of delivering all messages, when the persons to whom they are addressed reside within a reasonable distance from the terminal office. The company, however, has the right to make reasonable regulations as to free delivery limits, and as to additional charges for services rendered beyond such limits.

In the case of Hood *v.* Tel. Co., 47 S. E. R. (N. C.), 607, the Court ruled that a telegraph company failing to make any attempt to deliver a message, because the person to whom it was addressed resided beyond the free delivery limits, and, also, failing to notify the sender, or of its refusal to deliver, is liable in damages resulting from its negligence in not making the delivery.

[1] Compare Bullard *v.* American Exp. Co., *supra*, p. 104.

[1] Part of the opinion is omitted.— Ed.

In the case of Gainey *v.* Tel. Co., 48 S. E. R. (N. C.), 653, the Court says: "It is undoubtedly true, as argued by the learned counsel for the plaintiff, that the company is not exempt from liability, merely because the person addressed may chance to live outside its free delivery limits; because it undertakes expressly, and by the very terms of its contract, to make a delivery within those limits, free of any charge, and, impliedly at least, to deliver beyond the fixed limits; for which latter service an extra charge is made, not exceeding in amount the actual cost of such special delivery. The language of the contract in this respect is as follows: 'messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.' We have held that when a message is received at a terminal office, to which it has been transmitted for delivery, to the person addressed, it is the duty of the company to make diligent search to find him, and if he cannot be found, to wire back to the office from which the message came for a better address; and, likewise, it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free delivery limits, either to deliver it by a special messenger, or to wire back and demand payment, or a guaranty of payment, as it may choose to do, of the charge for the special delivery; and if it fails to deliver without demanding and being refused payment of charge, it will be liable for its default."

We do not regard this language as conflicting with our interpretation of said clause of the contract, which is, that the company must undertake to deliver a message to one outside the free delivery limits if upon notice the sender pays for such delivery, provided such person lives within a reasonable distance from the office of delivery. The language of the foregoing case as construed by us is a correct interpretation of the contract.[2]

HEWLETT *v.* WESTERN UNION TELEGRAPH CO.

28 Fed. 181. 1886.[1]

HAMMOND, J. The plaintiff, being transiently in the city of Memphis, sent from his hotel to the defendant company's office, with sufficient money to pay for it, the following message, to be transmitted by telegraph:

[2] See Western U. T. Co. *v.* Cain (1897), 40 S. W. (Tex.) 624; Bright *v.* Western U. T. Co. (1903), 132 N. C. 317.

[1] One paragraph of the opinion is omitted.— ED.

"1 P. M., GASTON'S, MEMPHIS, December 16, 1881.
"*To R. O. Bean, Leighton, Ala.:* Will leave to-night. Will you wait for me? T. G. HEWLETT."

The errand boy was told by the company's clerk that it would not be received without an additional sum of money to pay for the answer, and, not having that, he returned to the hotel, and the message was never sent, the plaintiff not having been informed of defendant's refusal to take it until it was too late to take the train. He sues for damages, and proves that he and one Bean were engaged in a joint enterprise to capture a fugitive from justice, for whose arrest there was a reward to be had of $1,600, which Bean received, and refused to share with plaintiff because he did not come to help. His failure to go he attributed to his failure to receive an answer to his message, and he claims compensation, to the extent of his share of the reward, from the defendant, for its refusal to transmit it.

The company justifies under its regulations on that subject, which it insists are reasonable. They are as follows:

"(11) All messages, except answers, or covered by franks, must be prepaid, unless guarantied by responsible parties. *Messages on the business of the party sending, and answers to collect messages, must invariably be prepaid.* Messages addressed to hotels, or to parties absent from home, must be prepaid in all cases, *unless they are answers to messages marked 'answer prepaid.'*

"(12) Transient persons sending messages which require answers must deposit in advance an amount sufficient to pay for a reply of 10 words. In such cases the signal '33' will be sent with the message, signifying that the answer is prepaid."

The only case cited by counsel, and they say that it is the only one directly in point as to the reasonableness of these rules in their relation to the deposit of money to pay for the expected answer by transient persons, is that of W. U. Tel. Co. *v.* McGuire, 104 Ind. 130, S. C. 2 N. E. Rep. 201, where it was held to be reasonable, and I am of the same opinion. I am not entirely satisfied with the grounds of that judgment; for it seems to me to place the ruling too entirely upon a mere question of etiquette between the parties to the correspondence. The court says:

"A person who sends another a message, and asks an answer, promises, by fair and just implication, to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this

natural inference, and to take reasonable measures for securing legal compensation for its services."

This may be true, if we assume that the subject-matter of the message concerns the business of the sender, and that only, and not at all the business of the addressee. Then it would be the rule of social etiquette, of course, as it is if one writes a letter strictly on his own business to inclose a postage stamp for the reply. But there is great force in the argument of plaintiff's counsel that it is none of the telegraph company's business to enforce rules of social courtesy like that; and since it cannot know whether there will be any reply, or whether, if there be, the circumstances may not be such that the sender of the answer should himself pay for it, and be anxious and willing to do so, the company should not refuse to send the original message, if it be paid for. He likened it to a regulation of a carrier of passengers refusing to transport a passenger at regular rates, unless he should buy a return ticket. And I take it that in an equal number of cases the relation of the parties may be such that the sender might reasonably expect and demand, notwithstanding the social rule of courtesy above referred to, that his correspondent should pay for the answer, and that in an equal number of cases he does do so. In many other cases, when the original message is solely about his own business, the sender may reasonably hope and expect the answer to be paid for by the other party. Again, often a transient person in distress, and with redduced funds, might wish to rely on the other party to pay for the answer; and since the company may protect itself by refusing to take the answer without prepayment by its sender, it would seem an unreasonable hardship, under those circumstances, to demand that he pay for both messages in advance. Or he might wish to go away to receive the answer, or to receive it over another line, or at another place, etc.; and so, under many imaginable circumstances, be reasonably exempt from the burden of depositing money in advance for a message he may never receive, and find it inconvenient and expensive to get back his deposit. Hence, take it altogether, I should not support the reasonableness of this regulation wholly on the ground of the sender's obligation to pay for the answer. He may very often be not so obliged, and that is an answer to it.

But I think this regulation is a reasonable one, notwithstanding the force of the plaintiff's attack on this Indiana case. It should not be segregated from the other regulations of the company on the subject of collecting the tolls, and tested by itself alone, on the reasoning of plaintiff's argument, as above set forth. This is only one regulation of a carefully devised system for securing payment

of tolls, consistently with enlarged accommodation of the public in allowing the customers of defendant to regulate among themselves this very matter of adjusting the burden of these tolls. I have quoted in the statement of facts the entire regulations on the subject, as I find them printed, italics and all, and an analysis of them shows that the company is endeavoring to accommodate the public as much as possible in this matter. It might reasonably, as the railroads do as to passenger fares, demand prepayment by the sender of all messages, whether they be originals or answers. But it does not do this. It allows answers to be sent at the expense of the person whose message is answered, and this is a privilege and a benefit it seeks to confer on the original sender by undertaking to collect of him that toll instead of requiring his correspondent to pay it, thereby lessening the chances of his answering at all. It requires all original messages to be prepaid or guarantied. If guarantied, the company will allow the sender, if he choose, to place the burden of the toll on the addressee,— by itself undertaking to collect the toll of him in the first instance, but of the sender at last, if the other refuses to pay. It seeks, as to answers, to accommodate the public in the same way, by undertaking to collect of the person addressed; and, as I understand the regulations, the sender of the answer is not expected to pay at all, certainly not to *prepay,* unless it be an answer to a message which has been sent to be collected from himself, or is sent to parties away from home, or addressed to hotels; and in these last-mentioned cases he need not prepay if it be an answer to a message marked "answer prepaid." In order to give them, their correspondents, and all persons who are interested in the use of the telegraph, the benefit of this system of collecting and adjusting tolls, the requirement is made that transient persons shall pay for the expected answers in advance, and it is not unreasonable, as a part of that system. It may be that a more liberal rule might be devised for transient persons, and that this one operates sometimes harshly and inconveniently; but that is not the question. In view of the whole system, a court cannot say that the power and discretion of the company to determine for itself what is best for all concerned has been unreasonably exercised. It has a choice of its own regulations, and the test of reasonableness is not whether some other would answer its purposes as well or better, but whether this is fairly and generally beneficial to the company, and all its customers.

Now, I have said elsewhere that reasonable regulations of public corporations like these must be reasonably applied, and that a rule which is generally fair may, under especial circumstances, become

oppressive and unreasonable, as applied in the particular case; and so these corporations must exercise ordinarily prudent discretion in relaxing their regulations in such cases. If, to use an illustration of the argument, a tramp, with just money enough to pay for his message, should so inform the company, and ask to have it transmitted, and take pay for the answer from its own sender, and this should be refused, it may be that the company would be liable; but I should think that, under these regulations, there would be in such case no refusal, and that almost any intelligent operator, when so informed, would take the message. No such a case is shown here. The plaintiff was neglectful in not looking after his message sooner than he did, and he was not a tramp, or destitute of funds to deposit for the answer.

Judgment for defendant.

HATCH *v.* CONSUMERS CO.

17 Idaho, 204. 1909.[1]

AILSHIE, J. This is an original action commenced in this court, praying for the issuance of a writ of mandate against the defendant corporation, requiring and commanding that it connect plaintiff's water pipes with defendant's water system.

We have heretofore held in Bothwell *v.* Consumers Company, 13 Idaho, 568, 92 Pac. 533, and Pocatello Water Co. *v.* Standley, 7 Idaho, 155, 61 Pac. 518, that the mains and laterals laid within the streets and alleys are the property of the water company, and that the franchise granted such company authorizes it to dig in the streets and alleys and use and occupy them for the purpose of laying and maintaining their pipe-lines and delivering water to consumers. We discover no reason for departing from the rule announced in those cases. (See, also, section 2840, Rev. Codes.) On the other hand, the consumer has no right or franchise to excavate the streets or to lay or maintain pipes therein. When he undertakes to pass beyond his property line with pipes, he is met by the public authorities and the franchise held by the water company. He is in no position to acquire a property right in the streets and alleys by laying pipes therein. The water company, on the contrary, is clothed with this power and right and all the necessary authority for creating and establishing property rights therein and the protection of such property. There is no reason in saying that the company has no interest in laterals it may lay in the streets from its main to the line of abutting property owners. These later-

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

als are of just as much use and as valuable to the company as its mains in proportion to the amount of water to be delivered through such laterals as compared with that delivered through the main. The only difference whatever is in the extent of the service. The capacity of a main is ordinarily such that it will supply a large number of consumers along the street from the one main. The capacity of a lateral is ordinarily such that it will only supply one or two consumers. The relative value to the company of the main and laterals is measured by the extent of the service from the two. The necessity, however, for one is just as great as for the other. Without a main none of the residents along a street can be supplied. Without a lateral the individual consumer cannot be supplied. The law of ownership is the same in the one case as the other, and the right of property and control is the same in each instance. Water companies maintain waterworks for the purpose of collecting rates and tolls. They operate them for gain. In order to collect tolls, they must deliver water. The consumer, on the other hand, pays his money for service. Unless he is served, there is nothing for which he may be called upon to pay.

We are aware that some courts have held that the consumer may be required to pay the expenses of "service connections," as it is sometimes called, or, rather, for laterals extending from the curb line to the main. So far as we have been able to examine, however, these decisions are based upon express statutes. There is a line of decisions to that effect in Wisconsin. The case of Gleason *v.* Waukesha County, 103 Wis. 225, 79 N. W. 249, is a leading authority on this point, and holds that the expense of laying water pipes from the curb line to connect with the main may be properly assessed against the property of the abutting owner, but this is based upon the express provision of the Wisconsin statute authorizing the levying of assessments against abutting property owners for such purposes "whenever the council shall order the paving or re-paving of any street in which water, gas mains and sewer or either of them shall have been previously laid or constructed." In that case it was claimed that the statute was unconstitutional, in that it authorized a taking of property without due process of law. The court upheld the statute on the ground that the laying of the gas and water pipes was an improvement to the property of the abutting owners, and that it conferred a benefit. We know of no case, however, that has held to such a rule in the absence of a statute or ordinance authorizing and providing for levying an assessment for such purposes.[2]

[2] Compare State *v.* Hillyard Water Co. (1908), 49 Wash. 232.
See State *v.* Seattle Lighting Co. (1910), 60 Wash. 81.

CHAPTER IV.

RATES.

Section 1.

Rates Fixed by the One Engaged in Public Service.

INTERNATIONAL BRIDGE CO. *v.* CANADA SOUTHERN RAILWAY CO.

7 Ontario App. 226. 1882.[1]

Spragge, C. J. The suit of the bridge company is for the recovery of tolls between the 31st of October, 1877, and the 31st of December, 1878; and the decree declares that the railway company is liable to pay to the bridge company tolls for the use of the bridge at the rate settled by the directors of the bridge company, namely: — And the decree then sets out the rates, which it declares the railway company liable to pay; and refers it to the Master to take an account of the amount due in respect of such user of the bridge from the earlier to the later of the above dates, having regard to the declaration contained in the decree, with interest; and orders payment of the amount to be found due by the Master. The decree contains no declaration or order in respect of tolls accruing due after the later of the above dates. It is no *res judicata* as to anything subsequent to 31st December, 1878; and is not in any shape binding upon the railway company as to anything subsequent to that date.

In the suit in which the railway company are plaintiffs and the bridge company defendants, the same points are raised as in this suit, and the two were argued together.

Mr. Crooks conceded that it was incident to the corporate powers of the bridge company to require payment of tolls from railway companies for the user of the bridge, and to fix the amount of tolls to be paid for such user.

But Mr. Crooks, while conceding to the bridge company the possession of power to fix tolls, contends that this power is quali-

[1] Part of the opinion is omitted.— Ed.

fied by the implied condition, that the tolls fixed must be reasonable; and the ground upon which he bases this contention, is that the franchise of the company, and the structure built and used under and in pursuance of their franchise, are *publici juris;* and Mr. Crooks cites high authority for his position. He refers among other authorities to Lord Hale's treatise *De Jure Maris;* and the treatise of the same learned writer *De Portibus Maris,* to Mr. Justice Strong's observations upon the nature of a franchise and structure of a similar character in The Attorney-General *v.* The Niagara Falls Suspension Bridge Company, 20 Gr. 34, 490; to Allnut *v.* Inglis, 12 East 527, the London Docks wine case, and which is referred to in the learned and elaborate judgment of C. J. Waite in the case of Munn *v.* Illinois, 4 Otto 113. We are also referred to the language of Mr. Justice Blackburn in the case in the Lords of the Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 236. The earlier portion of the learned Judge's answer to the question propounded by the House is apposite to this point.[2]

The question is a very interesting one; but our decision in his favour would not help Mr. Crooks in this case, unless he is able to show not only that the tolls fixed by the company must be reasonable, but that they are in fact otherwise than reasonable.

The parties differ widely as to the dividend yielded by the tariff of charges. Mr. Crooks makes it (reducing the capital by the items he objects to) about 17 per cent. Mr. Cassels, on the other hand, taking the capital at two millions, makes the dividend not to exceed 8 per cent. if spread over the whole period since the completion of the bridge, or, taking the year 1878 by itself, not to exceed 10 per cent.

Reading the evidence of Mr. Gzowski, and the very interesting narrative that it contains of the obstacles and difficulties encountered in the construction of the bridge, and the skill and perseverance with which he met and surmounted them, the evidence of Mr. Brydges, who was president of the company during its construction, and until the summer of 1874, and the evidence of Mr. Hannaford, the company's engineer then and ever since, one cannot fail to see that it is impossible to predicate of this bridge an immunity from disaster. So far as skilful and conscientious work

[2] In this case MR. JUSTICE BLACKBURN says in part: "The obligation which the common law imposed upon him [a common carrier] was to accept and carry all goods delivered to him for carriage according to his profession (unless he has some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him."

could give it permanence, no one can doubt that it has it; but Mr. Brydges says that no other bridge that he had seen, compared with this one in point of danger and risk. One of my learned brothers referred to the Tay bridge, which, since Mr. Brydges gave his evidence, has been swept away. It was regarded as a monument of engineering skill, but its destruction has shewn that the elements are more powerful than any work of man, and the International bridge is certainly exposed to not less danger than was the bridge across the Tay.

To speak of six per cent. upon capital laid out in such an enterprise, is most unreasonable. It is not necessary to say what we should think reasonable. But assuming it to be competent to the Courts to say when the point of unreasonableness has been reached, and to relieve against overcharge; we are unable to say that in this case that point was reached during the period with which we have to deal in this case.

In my opinion, the decree is right. It may be that the railway company failing in the principal object of their bill, may not care to take the reference which the decree gives them.[3]

[3] When the case was affirmed in the House of Lords, *sub nom.* Canada Southern Railway Co. *v.* International Bridge Co. (1883), 8 App. Cas. 723, THE LORD CHANCELLOR (EARL OF SELBORNE) said with regard to the rates: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked Counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned Judge in the Court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterise that argument as anything less than preposterous."

TIFT *et al. v.* SOUTHERN RAILWAY CO. *et al.*

10 I. C. C. R. 548. 1905.[1]

ON June 22, 1903, the defendant railroads put into effect an advance of 2 cents per 100 pounds on lumber. The plaintiffs prayed that the defendants be ordered to cease from enforcing the advance in rates, and for other relief.

CLEMENTS, Commissioner. The defendants do not attempt to justify the advance on the ground that the previous rate was unremunerative. The justifications set up are consistent with remunerativeness of that rate. In their answer they allege, among other things, that, if the advance is not allowed, "the result will be to prevent the respondents and other railroads in the South from sharing to any extent whatever in the phenomenal prosperity of the business in the regular grades of lumber."

The lumber business, it is true, has grown from its inception, but the proof does not show that for the two or three years preceding the advance the prices of the mill products had materially increased or that the profits realized on the business were phenomenally large. (Finding 8.) However that may be, it is clear that, if a rate on an article of traffic is already remunerative, the increased prosperity of the business of manufacturing that article is no ground for an advance of the rate. The claim to the contrary on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers that a rate may be made high as "the traffic will bear." On this point we quote what was said by us in the case of The Central Yellow Pine Association *v.* Illinois Central Railroad Company, *et al.* (*ante,* 561).

"The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper by *raising rates* is simply a license to the carrier to appropriate that prosperity, or in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier."

The carriers necessarily and justly participate in the increased prosperity of their patrons in the resultant enlargement of their own business. This appears to be the case with these defendants

[1] The statement of facts is omitted, and a short statement of the point in controversy is substituted. Part of the opinion is also omitted.— ED.

as the tonnage of lumber shipped over their lines and their revenue therefrom have steadily grown in amount. Take the two years, 1901 and 1902, immediately preceding the present advanced rate, and 1903 the year of the advance; the lumber tonnage of defendants has grown in those years from 6,566,407 tons in 1901, to 9,808,463 tons in 1903, an increase of 3,242,056 tons. (Finding 9.)

The business of the defendants, not only in lumber, but in traffic in general, has grown and is growing largely, and in view of the fact, that they derive their franchises, or "right to exist" from the public, the lumber shippers, as part of the public, might plausibly, to say the least, claim that they have a right to participate in the prosperity of the defendants by having their rate reduced rather than advanced. The general rule is, the greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association Territory and in the Eastern Territory that rates in general are made materially lower in those territories than in Southern Territory.

As before stated, the advance in the rate is not sought to be justified on the ground that the rate in force was unremunerative or not a reasonable return for the service rendered. The principal ground urged is that additional revenue was needed to meet increased expenses and that, in the language of one of the principal witnesses for the defendant, they "looked around to see where they could best get that additional revenue and one of the commodities which they thought would *bear* the advance was lumber."

Carriers have no right to advance a rate which is already reasonably high and which yields an adequate return for the service rendered, solely because additional revenue is needed. In Smyth *v.* Ames (169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418), the Supreme Court held that "the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." . . . "It cannot therefore be admitted that a railroad corporation maintaining a highway under the authority of a state may fix its rates with a view solely to its own interests and ignore the rights of the public." In Covington & Lexington Turnpike Road Co. *v.* Sandford (164 U. S. 596, 597, 41 L. ed. 566, 17 Sup. Ct. Rep. 198), it is said: A corporation "is not entitled, as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock. . . . Stockholders are not the only persons whose rights or interests are to be considered. The rights of the public

are not to be ignored. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

It is clear, therefore, that the mere fact of the need of additional revenue to meet increased expense does not justify the advance in the rate on lumber.[2]

BRUNSWICK AND TOPSHAM WATER DISTRICT *v.* MAINE WATER CO.

99 Me. 371. 1904.[1]

SAVAGE, J. We turn to the other question involved in this request. That relates to the assumed existence of a nearer and cheaper source of supply than the one now in use by the company, which is a part of its present entire plant, and which in part represents its actual investment. We do not doubt that, when the worth of a public service of this kind to the public or the customers is spoken of, necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to do so, and were it not for the existence of the practically exclusive franchises of the supplying company. When the worth of the water to a consumer is estimated, we are not limited to the value of water itself, for it is an absolute necessity. Its value has no limit. Water, speaking abstractly, is priceless; it is inestimable. To sustain life it must be had at any price. And in this respect a public water service differs from all other kinds of public service. In estimating what it is reasonable to charge for a water service, that is, not exceeding its worth to the consumers, water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element of its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money of other people higher than the event shows they could serve themselves for, rather than make the venture themselves, and risk their own money to lose in an uncertain enterprise. It was said by us in the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable for the consumer to be charged with something on that account. That is one of the things which make up the worth of the water to the customer. The same element enters

[2] For a full history of this case see, also, 123 Fed. 789, 138 Fed. 758, 148 Fed. 1021, and 206 U. S. 428.

[1] Only one point is reprinted from the opinion.— ED.

always into the relations between producer and consumer. But such a consideration as this last one must always be treated with caution. The company is only entitled to fair returns, in any event, and "fair" to the customer as well as to itself.

In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals, to supply themselves, for one may be blessed with a spring, and another may have a good well. It means the worth to the individuals in a community taken as a whole. It is the worth to the customers as individuals, but as individuals making up a community of water takers. In the very nature of things, a water system is usually intended to supply a somewhat compactly settled community, or a community whose geographical limits are somewhat restricted. As a matter of fact, in this state such systems usually supply villages, or the more compact portions of cities. The necessity does not exist for extending such systems beyond these limits, and the expense would be practically prohibitive. Such a community must, in general, stand as a whole. The rates for such a system are generally and properly uniform, although the expense of supplying some, as those nearer the source of supply, is actually less than that of supplying those at the outermost limits. Still the benefits are uniform, and uniform rates are reasonable. Now, such a community is, we think, entitled to the benefit of such natural and sufficient facilities for procuring pure water as exist in its vicinity. Communities are in every respect entitled to the benefit of existing natural advantages.

It therefore seems to be reasonable that a public water service company undertaking to supply a community with water is bound to do so wisely and economically. It is bound to take advantage of practicable natural facilities. If there is more than one source of supply, other things being equal, the community is entitled to have the least expensive one used. So long as the company enjoys practically exclusive franchises, so long it must afford the community the benefit of the conditions which nature has provided for them. For instance, if water can profitably be served from a nearer source of supply at a certain rate, the company ought not to be permitted to charge a higher rate based upon the expense of bringing it from a farther and more expensive source. And this even if in attempting to serve this and other communities together it might be more profitable to the company to do so.

BRYMEN *v.* BUTLER WATER CO.

179 Pa. St. 231. 1897.[1]

MR. JUSTICE WILLIAMS. A provision in the third section of the act of June 2, 1887, relating to the jurisdiction of the courts over gas and water companies, is supplemental to the act of 1874, and defines somewhat more distinctly the duty of such companies to furnish the public with pure gas and water, but it contains no allusion to the subject of price. The power of the court to interfere between the seller and the buyer of water is conferred only by the provisions already quoted from the act of 1874, and that act authorizes the court to entertain the complaint of the buyer, to investigate the reasonableness of the price charged, and to "dismiss the complaint," or to order that the charges complained of, if found to be unreasonable and unjust, "shall be decreased." The water company prepares its schedule of prices in the first instance, and makes its own terms with its customers; but if these are oppressive, so that, in the exercise of the visitorial power of the state, the just protection of the citizen requires that they be reduced, then the court is authorized to say: "This charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate." This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its dealings with the public. It may be that the power to order that any particular item of charge shall "be decreased" includes the power to fix the extent of the reduction that must be made, or to name the maximum charge for the particular service in controversy, which the court will approve; but the decree is that the item shall "be decreased" either generally or to a sum named. The schedule of charges must be revised accordingly by the company defendant, and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases.

We do not think this supervisory power would justify the court in preparing a tariff of water rents, and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property and the business of a solvent corporation from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The act of 1874 contemplates no such radical departure from established rules as this,

[1] Only an extract from the opinion is here reprinted.— ED.

but provides simply for the protection of the citizen from extortionate charges, specifically pointed out and complained of by petition.[2]

Section 2.

The Power of the State to Fix Rates.[1]

CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. *v.* IOWA.

94 U. S. 155. 1876.[2]

Appeal from the Circuit Court of the United States for the District of Iowa.

This bill was filed by the Chicago, Burlington, and Quincy Railroad Company, a corporation created by the laws of Illinois, for an injunction restraining the Attorney-General of the State of Iowa from prosecuting suits against it or its officers, under the provisions of an act passed by the legislature of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State," approved March 23, 1874.

Mr. Chief Justice Waite delivered the opinion of the court.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn *v.* Illinois, *supra,* p. 113, subject to leg-

[2] In Madison *v.* Madison G. & E. Co. (1906), 129 Wis. 49, the Court said, at page 268:

"But it is insisted by respondents that, since the gas company is obligated to furnish gas to the city and its inhabitants at a reasonable price, the court has jurisdiction to determine what, under the existing facts and circumstances, is a reasonable charge, and to enforce it as the measure of future service under like conditions. No doubt the court can ascertain, within its judicial function and whenever the question is necessarily involved in any controversy to which the gas company is a party, what is a reasonable charge for gas furnished. This, however, as already shown, is the extent to which the court can go. Whatever might be determined to be a reasonable charge, under the facts and circumstances adduced in such an inquiry, cannot be enforced as a fixed charge for the service for any purpose other than to determine the particular controversy between the parties and their privies. If it were attempted to enforce it as a prescribed future charge, it would, in an indirect way, usurp the legislative prerogative of prescribing by rule the compensation for a future public service. This, as we have seen, the courts cannot do."

[1] In this connection notice again the cases in Chapter I, Section 3, *supra.* — Ed.

[2] Part of the statement of facts, the arguments of counsel and part of the opinion are omitted.— Ed.

islative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington, and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the law or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.[3]

CENTRAL OF GEORGIA RAILWAY CO. *v.* RAILROAD COMMISSION OF ALABAMA.

161 Fed. 925. 1908.[1]

JONES, District Judge.

XV. Has the Legislature attempted to delegate legislative power to the Commission in the authority conferred upon it to make and unmake rates and classifications established by statutes? The act of August 9, 1907, provides in the first section:

"That in all cases where any classification of railroads or of any

[3] In Cotting *v.* Kansas City Stock Yards Co. (1901), 183 U. S. 79, MR. JUSTICE BREWER, after stating the doctrine of Munn *v.* Illinois, and referring to cases which had followed it, said, at page 85:

"These decisions go beyond but are in line with those in which was recognized the power of the State to regulate charges for services connected with any strictly public employment, as, for instance, in the matter of common carriage, supply of water, gas, etc. Spring Valley Water Works *v.* Schottler, 110 U. S. 347; Railroad Commission Cases, 116 U. S. 307; Wabash, St. Louis & Pacific Railway *v.* Illinois, 118 U. S. 557; Dow *v.* Beidelman, 125 U. S. 680; Chicago, Milwaukee, etc., Railway *v.* Minnesota, 134 U. S. 418; Chicago & Grand Trunk Railway *v.* Wellman, 143 U. S. 339; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362; St. Louis & San Francisco Railway *v.* Gill, 156 U. S. 649; Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S. 578; Smyth *v.* Ames, 169 U. S. 466; San Diego Land Co. *v.* National City, 174 U. S. 739; Chicago, Milwaukee & St. Paul Railway *v.* Tompkins, 176 U. S. 167."

[1] The statement of facts is omitted, and only an extract from the opinion is reprinted.— ED.

articles of freight or any maximum rates or charges for the transportation of passengers or freight over any railroad in this state, have been, or may hereafter be prescribed by statute, or any prevailing rates or charges for such transportation have been, or may hereafter be, by statute made the maximum rates or charges, the Railroad Commission of Alabama shall have the power and is hereby authorized to change such classifications and such rates or charges, or any of them, from time to time as conditions may, in its judgment render expedient or proper so to do, whether the effect of such changes be to increase or reduce any of the rates or charges, and to establish and order to be put in force in lieu thereof any new classification or rate or charge which it may deem reasonable and proper; and the classifications, rates or charges so established by it shall be the lawful classifications, rates or charges until further changed by said Railroad Commission."

Like power is given as to the rates and classifications in the acts known as the "Eight Group Acts."

Legislative Power has been Attempted to be Delegated to the Commission as to Change of Statutory Rates and Classifications.

XVI. The will of legislators never becomes the law, unless expressed in the mode and form the Constitution demands. The Legislature, in framing a statute, may provide for its unchanged operation until it is repealed, or it may provide for contingencies arising after it goes into effect, which in its wisdom may require change in the law, and provide for the change, in view of the happening of these contingencies, upon the occurrence of which the lawmaker himself declares in the Statute what the change shall be. But, whatever the intent of the lawmaker, a statute, in order to ripen into a law, must always be a perfect expression of the legislative will, upon every contingency with which the statute deals, as it leaves the hands of the lawmaking power. When the Legislature declares its will as to contingencies, it may lawfully make the taking effect of the statute in the first instance, or its suspension or abrogation afterwards, and the substitution of some other law, depend upon the ascertainment of some particular state of facts by an executive officer. But, to be a perfect expression of the legislative will as to these matters, the statute itself must ascertain or prescribe a state of facts which constitute the condition or contingency upon which the change may be made, and what change shall be effected in the prior law, when that contingency is ascertained. Under a statute so framed, the Legislature has delegated no legislative authority to the executive officer. It has simply made use of his services to ascertain a state of facts, upon the ascertainment of which the Legislature itself declares, in advance, its own

judgment as to "what the law shall be" under the changed conditions. The contingency upon which the change shall take place in the operation of a law must be a state of facts which the Legislature either ascertains in so many words, or defines or prescribes by general definition, and upon the finding of which state of facts the Legislature, and not some other body, forms the opinion, and declares that it is expedient and proper to change the operation of the law. The propriety and expediency of changing a law is the very question which the Constitution commits exclusively to the wisdom of the Legislature, and it must express its own judgment and will in the statute as to these questions. If the opinion or judgment of some other department as to the happening of some undefined event, and the effect such event should have upon the legislative policy, is to determine whether there shall be a change in the law, it is the judgment and will of the officer as to the expediency of a change, and not the opinion and will of the lawmaking power, which effects the changes. The statute here makes the expediency and propriety of a change, which shall be made when the officer so determines, depend solely upon the discretion and will of an executive officer, and not upon the happening of any state of facts upon which the Legislature itself has passed its judgment and uttered its commands. The statutes in that posture are neither more nor less than a legislative declaration that there shall be a change in the legislative will because an executive officer deems it expedient, and that because the executive officer so wills thereafter the legislative will shall be only what an executive officer prescribes. This is nothing more nor less than the entire abdication of the duty of the Legislature to determine the expediency and propriety of legislation, and the surrender of legislative power to an executive officer, to use as he pleases in the future.

The court has struggled hard to find some way, consistent with obedience to the Constitution, to avoid the consequences and inconveniences, both public and private, which must follow from striking down the powers here attempted to be conferred upon the Commission. Finding no escape on principle, the duty of the court is plain. It must enforce the Constitution. The Legislature doubtless intended in the passage of these statutes to leave the whole matter of rates and classifications in the keeping of the Commission, and thought it had done so. It could have done so by an absolute repeal of the schedules and classifications fixed by it, leaving the Commission, as an administrative body, to work out under rules and principles fixed by the Constitution, the statutes, and the common law, what are reasonable classifications and rates, in view of the facts in the particular cases with which the

Commission deals. The Legislature could also have retained the "Group Acts" as a general guide for the Commission, and yet given the Commission power to change them, by providing in those statutes that upon the happening of a certain state of facts therein declared or defined, not upon the mere opinion or judgment of the Commission on undefined conditions of which the Commission is the sole judge, and upon which the Legislature itself made no declaration "what the law shall be," the Commission might thereupon change the classifications and rates, within certain limitations, which the statutes themselves would state or define. But nothing of that kind was provided for in any of the statutes. The Legislature has not repealed or changed them. The constitutional trouble with the statute is that the legislative power has specifically declared its will upon the wisdom and expediency of the particular classifications and rates, and put them upon the statute books as the law of the land. It takes the lawmaking power to repeal or change a law, as well as to make a law; and the power of repealing or changing a law, or substituting another law in its stead, cannot be delegated to any other department, much less to a statutory board. Turn the proposition over as we may, and scan it from every constitutional point of view, we are always confronted with the fact that, in order to change the laws now in existence as to rates and classifications, they must be repealed or altered by the legislative power which made them. The legislative power which made them has not repealed or altered them. It has merely attempted to let another body undo what the Legislature has done. It has not declared in any of those statutes its own will as to "what the law shall be" on any changed state of facts which the lawmakers have defined or prescribed, nor, when that state of facts is ascertained, what shall be either the nature or extent of the changes which the lawmakers will shall result therefrom, except that the wisdom and judgment of the Commission shall be the legislative will as to the change. On these questions, upon which the Legislature must speak if the Constitution be obeyed, it has declared no will of its own as to "what the law shall be." It has simply declared to the Commission that it is authorized, for any reasons it may think of sufficient importance, to unmake what the Legislature has declared to be the law of the land, and set up other standards of its own, which shall stand as the law until again changed by order of the Commission. In short, it has referred the whole matter of "what the law shall be" to the Railroad Commission as a "committee with power to act," and declared that the legislative will as to the future shall be whatever the Commission may will and declare.

Of the wisdom of the Legislature's determining for itself what are just and reasonable rates and classifications, and imbedding those rates and classifications in statutes, whereby they become the law of the land and cannot be altered except by an act of the lawmaking power itself, the Legislature must determine for itself; but, when the Legislature does so determine, the Constitution fastens upon their act, and provides the only mode in which the requirements of such enactments can be undone or changed. While some inconvenience, both public and private, must result from following the Constitution in this case, the evil is of small consequence as compared with the greater evils which would result in allowing such departures from the fundamental law. It is vital to the welfare and happiness of the people that the law shall not be made and unmade, or changed, save by the lawmaking power itself. Today it is the carrier and those who deal with him who are attempted to be subjected to the doctrine that administrative officers may change the law as enacted by the Legislature, and prescribe different rules of conduct from those made by the supreme lawmaking power, varying the law according to their own notions whenever, "in their judgment," it is "expedient and proper so to do." If such power can lawfully be conferred upon administrative officers in these cases, it cannot be denied to executive officers in other cases. It is an alarming doctrine to proclaim in a free country that the laws for the control of the rights and business of citizens, under the complex conditions of modern life, can be made to give place to different obligations and rules made by executive officers, "whenever conditions may, in their judgment, render it expedient or proper so to do." The whole matter is exhaustively discussed in Field *v.* Clark, 143 U. S. 694, 12 Sup. Ct. 505, 36 L. Ed. 294, wherein is quoted with approval the words of the Supreme Court of Ohio (Railroad Co. *v.* Clinton County Com'rs., 1 Ohio St. 88) that:

"The true distinction is between the delegation of power to make a law, which necessarily involves a discretion as to what it shall be, and the conferring of authority and discretion as to its execution, to be exercised under and in pursuance of law. The first cannot be done; to the latter, no valid objection can be made."

In the one case the official overrides the law and substitutes his own judgment for it; in the other, he does not change the law, but merely conforms to it. A late instructive case is State *v.* Great Northern Railway Company, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250. Our own cases of Mitchell, Judge, etc., *v.* State *ex rel.*, etc., 134 Ala. 392, 32 South. 687, and Harlan *v.* State *ex rel.*, 136 Ala. 155, 33 South. 858, are conclusive on this point.

Whether the legislative department of a state, under its Constitution, can delegate legislative power, involves no federal question. The decisions of the highest court of the state are binding upon the federal courts on such a question. Few cases can be found where a Legislature has ever attempted to authorize any other department of the government to strike down an explicit legislative command, and substitute, in its unshackled discretion, some other command; and no case can be found where such an attempt ever succeeded. See State *v.* Morris County, 36 N. J. Law, 72, 13 Am. Rep. 422.

VILLAGE OF SARATOGA SPRINGS *v.* SARATOGA GAS, ELECTRIC LIGHT AND POWER CO.

191 N. Y. 123. 1908.[1]

CULLEN, C. J. This appeal presents the question of the constitutionality of the statute passed by the Legislature in 1905 (Chap. 737), providing for the appointment by the Governor of a commission, which was authorized to determine, upon the complaint of municipal authorities or consumers, the maximum price to be charged for service by gas and electric light companies. This statute confers many other powers upon the commission. This appeal, however, presents only the question of the validity of the statute in so far as it confers upon the commission the power to fix maximum rates. The provisions of the statute in this respect are easily separable from the remainder of the act, and, therefore, it is the validity of such provisions alone that we shall consider on this appeal.

The argument by the learned counsel for the appellant in their attack upon the statute has taken a very broad range. While they concede that the fixing of maximum rates of carriers and public service corporations as a proper exercise of the police power of the state, provided, of course, that the rates so fixed are not confiscatory and in violation of property rights, it is contended that the power is strictly legislative, and that the act before us is unconstitutional, in that it assumes to delegate to the commission, an administrative body, legislative powers.

The argument against the constitutionality of the underlying feature of the statute proceeds on two propositions — one that legislative power cannot be delegated, and the other that rate-making is a legislative power. Each proposition is true, if not construed too broadly, but each is liable to such misconstruction. To be strictly accurate, the first requires the qualification pointed out

[1] The arguments of counsel and part of the opinion are omitted.— ED.

by Chief Justice Marshall in Wayman *v.* Southard (10 Wheat. 1, 42): "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are *strictly and exclusively* legislative. But Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself." If by the second proposition it is intended to assert that the rate-making power being part of the police power is vested in the Legislature, it is true. But if it is intended to go further and deny the power of the Legislature to confer by general laws upon other branches of the government, the duty not only of executing the law, but of determining its application to particular cases and the formulating rules for its exercise, then in my judgment it is not true. *A priori* reasoning as to the nature and proper distribution of the powers of government is not conclusive on the question of what powers are so inherently legislative as to preclude their delegation in any degree to the other branches of the government.

We are now brought to the consideration whether, not the power to enact general laws for the regulation of rates, but the power to prescribe particular rates to be charged by particular carriers, public service corporations, or other persons engaged in occupations or business affected with the public interest, and so constitutionally subject to regulation as to their charges, is so inherently and exclusively a legislative power that it is impossible of delegation to other branches of the government. There is first presented to us the argument resting on history, and it is said: "It cannot be gainsaid that until very recently the duty (that of imposing rates) was at all times a legislative one. For many centuries Parliament has directly legislated as to the price of products, regulating the selling value of the great staples like wool and food, and even the employment of labor. . . . The earliest known regulation of rates of carriage was by an act of Parliament in 1692." If by this it is intended to assert that specific rates for commodities, services, or labor were prescribed by Parliament alone, my research (which is necessarily limited) leads me to the belief that the statement is incorrect. Legislation fixing the wages of laborers commenced at a very early period in England, and it may be that at the time the act of Parliament in terms fixed the special wage. The matter was the subject of different, and possibly conflicting, legislation until the time of Elizabeth, when many of the old laws were repealed and a comprehensive statute enacted embracing servants, laborers, artificers, and substantially all of what we would term the wage-earning class. St. 5 Eliz. (1562) c. 4. The statute (section 15) made it the duty of the justices of the peace in every shire to meet with the sheriff of the county, if it was convenient,

and with the mayor of any city or incorporated town, if there were such in the shire, after Easter in each year, and limit, rate, and appoint the wages for all artificers, handicraftsmen, husbandmen, or other laborer, servant, or workman. As far as I can discover from the time of the enactment of this statute until the regulation of wages ceased to be regarded as a proper subject for state control, wages were fixed, not by act of Parliament, but by the justices of the peace. This must have been the most extensive, if not also the most important, field of rate making upon which the government ever entered. The power thus devolved upon the justices of the peace was not conferred on any principle of local self-government which obtains with us, for no such idea prevailed in England, except possibly in the cases of chartered cities or towns to which special privileges were granted by their charters. The justices of the peace were appointed and removed by the Crown at pleasure, and, like our own, were more administrative than judicial in their functions. (People *ex rel.* Lawrence *v.* Mann, 97 N. Y. 530.) The power was conferred on the justices simply for convenience, or, possibly, of necessity, because at the time of the enactment of the statute the condition of the country, almost devoid of proper highways for the transportation of goods, and with comparatively little communication between the inhabitants of its different parts, must have occasioned great difference in the price of commodities and rates of wages in different localities. The only act I find passed in 1692 on the subject of carriers is St. 3 W. & M. c. 12. By section 24 it is enacted "that the Justices of the Peace of every County and other Place within the Realm of England or Dominion of Wales shall have Power and Authority, and are hereby injoined and required, at their next respective Quarter or General Session after Easter Day, yearly, to assess and rate the Prices of all Land-carriage of Goods whatsoever to be brought into any Place, or Places within their respective Limits and Jurisdictions, by any common Carrier or Wagoner." Here again the power to fix rates was conferred on administrative officers. These statutes must have remained extant till the close of the eighteenth century, for in an edition of Burns' Justice, published in 1800, much space is devoted to the duty of the justices under them, and an edition of Bacon's Abridgment, published in 1807, mentions them as then in force. Indeed, Sir James Stephen states that the act of Elizabeth was not formally repealed until 1875, though it practically became a dead letter many years before. Legislation in England prior to the revolution would, therefore, seem rather to support than to disapprove the proposition that details of rate making could properly be delegated to administrative officers.

The enormous pecuniary interest involved, and the inherent difficulties of the problem, would doubtless dictate great caution and mature deliberation in enacting any legislation on the subject; but it seems to me that it should equally dictate that the legislation enacted should provide the most practical, just, and efficient solution of the problem. These considerations also apply to the case before us. There are in this state approximately 450 gas light and electric light companies. They are located in nearly every portion of the state, which contains within its bounds, not only cities varying in population from 10,000 to 4,000,000, but villages, agricultural or rural communities, and the wild forests of the Adirondacks. It is plain that no uniform rate of charges could be established that would be just or reasonable. Besides, the difference in the output of the several companies, varying with the size of the communities they respectively supply, as well as the difference in the cost of material to the various companies, dependent on their location with reference to the cost of transportation of coal, oil, and the like, would make a rate that was fair in one place unreasonable in another. Therefore, any close approximation to a reasonable tariff would require special rates to be prescribed for many different localities. To do this properly would involve an investigation into the particular facts in each case. There was a time in the history of this country when carriers and public service corporations were so few that the Legislature itself might have performed that labor; but by reason of the rapid growth of population and the great increase in the number of such corporations it has become impracticable for the Legislature to discharge that duty. Moreover, many rates might require alteration from time to time. That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine particular rates, has been said several times in the opinions rendered by the Supreme Court of the United States in the various railroad commission cases and in those of state courts. Of course, these remarks are obiter, and they are quoted only to show the very general recognition by the courts that convenience, if not necessity, requires such a course. While no consideration of convenience or of supposed necessity would justify us in ignoring any constitutional mandate or limitation, it must be remembered that we have no express constitutional provision on the subject, and that it is sought to condemn the legislation before us solely by extending the principle that the Legislature cannot delegate legislative powers (a principle which, though unquestionably true, is, as we have seen, true only within limits) to a point that would render efficient legislation on the subject im-

practicable. It cannot be said, to use the language of Justice Harlan, that in any real sense the Legislature has delegated its power to the commission. The statute is complete. The Legislature, not the commission, has enacted that there shall be maximum rates for the charges of the gas and electric light companies, and that light shall be furnished to consumers at those rates, and has provided the penalty for extorting greater charges for service. What is intrusted to the commission is the duty of investigating the facts, and, after a public hearing, of ascertaining and determining what is a reasonable maximum rate.

It is now necessary to consider the objections to some special features of the particular act before us. It is contended that, even conceding that the Legislature may commit to an administrative board the power to determine a tariff of rates, the statute must prescribe some standard by which the action of the board is to be governed, and that otherwise the whole plenary power of the Legislature is intrusted to the board, whose action may be arbitrary; and it is urged the statute before us provides no such standard. We think otherwise. The statute provides that the commission shall fix the rate within the limits prescribed by law. This includes both statute law and common law. There may have been companies which had franchises immune from invasion by which they were authorized to charge specific rates. The common law prescribes the rule that the rate shall be reasonable, and I think, even without special mention, the statute would necessarily imply the same limitation. But it is said that, granting this, "reasonable" is really no standard, but a mere generality. Again, we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form. A lawmaker may exhaust reflection and ingenuity in the attempt to state all the elements which affect the reasonableness of a rate only to find that in a particular case he had omitted the factor which controlled the disposition of that case.

INTERSTATE COMMERCE COMMISSION *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY CO.

167 U. S. 479. 1896.[1]

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

A similar question was before us at the last term, in Cincinniati, N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, and in the opinion, on pages 196 and 197, we said:

"Whether congress intended to confer upon the interstate commerce commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

"We do not find any provision in the act that expressly, or by necessary implication, confers such a power.

"It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. That is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of Interstate Commerce Commission *v.* Baltimore & O. R. Co., 43 Fed. 37, and whose judgment was affirmed by this court. 145 U. S. 263.

"'Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits.'"

The views thus expressed have been vigorously and earnestly challenged in this and in other cases argued at the present term. In view of its importance, and the full arguments that have been presented, we have deemed it our duty to re-examine the question in its entirety, and to determine what powers congress has given to this commission in respect to the matter of rates. The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country, and subjected to varying and diverse conditions.

It will be perceived that in this case the Interstate Commerce

Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future.

We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication; and, second, the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission.

These considerations convince us that under the interstate commerce act the commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the commission no functions to perform in respect to the matter of rates, no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And, with this knowledge, it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions, and enforcing obedience to all these provisions, tends, as observed by Commissioner Cooley in *In re* Chicago, St. P. & K. C. Ry. Co., 2 Interst. Commerce Com. R. 231, 261, to both reasonableness and equality of rate, as contemplated by the interstate commerce act.

LOUISVILLE AND NASHVILLE RAILROAD CO. *v.* INTERSTATE COMMERCE COMMISSION.

184 Fed. 118. 1910.[1]

SEVERENS, Circuit Judge. Three several complaints were made to the commission concerning certain freight rates charged by this complainant upon traffic between New Orleans, La., and Mobile, Ala., between New Orleans and Pensacola, Fla., and between New Orleans and Montgomery, Selma, and Prattville; each of which last three mentioned places being in Alabama and within the same zone of official classification. The complaint in each case was that the rates were unreasonable and unjust *per se,* and were unduly prejudicial to the commercial interests of New Orleans. The complaints were made by the board of trade of the last-named city. The commission gave notice thereof to the complainant and fixed a time and place for hearing. The complainant appeared and an-

[1] Part of the opinion is omitted.— ED.

swered. Proofs were submitted by the respective parties and considered by the commission. Whereupon the commission, being of opinion that the rates which were charged were too high, reduced them in respect to several classes of freight, and fixed them at specified new rates, which it ordered the complainant to observe. By its order the date upon which it should become effective was stated. No further statement in detail of these proceedings is necessary, as their regularity is not contested.

A brief history of the matter of rates on the routes above mentioned is necessary to a full understanding of the action of the commission and the effect of its order. A schedule of rates on these routes was fixed by the railroad company in 1887, and adhered to until 1907, when, upon complaint made by shippers at New Orleans that the through rates were unreasonably high, and amounted to more than the sum of the local rates, and asking for a reduction of through rates to rates not greater than the sum of the local rates between the termini of the through routes and intermediate points, the railroad company changed its schedule by raising the local rates so that their sum should equal the through rates which it had been charging. The through rates were left undisturbed. These conditions continued until the autumn of 1909, when the New Orleans Board of Trade made complaints of the existing rates to the Interstate Commerce Commission, urging that they were unreasonable and asking for an order requiring the reduction of the local rates to the old schedule, and the reduction of the through rates to the sum of the locals so reduced. The commission was of opinion that the known circumstances and the proofs supported the complaints, and on November 26, 1909, made the order in question. It is to be understood that what is here said relates to certain classes of freights and not to entire schedules. The object of this bill is to obtain a decree enjoining the commission from enforcing its order. The complaint made against it is that it is in excess of the authority conferred by the acts of Congress creating the commission and defining its powers, and that the order is in violation of the constitutional rights of the complainant. And it is further urged that the order is based upon manifest errors of law and fact, that the rates prescribed by it are unreasonably low and in violation of section 1 of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and that it violates section 3, in that it creates undue and unreasonable preferences. From these premises it is seen that the subject of the controversy is an order prescribing the maximum rates on interstate traffic. That the order concerns a subject within the scope of the powers of the commission cannot be doubted; and the first question is

whether the order transcends the due limitation of the powers which are undoubtedly possessed by the commission.

In pursuing this inquiry it is of prime importance that we apprehend clearly the nature of the power on which the order rests; and for greater clearness it is well to emphasize the fact that the particular power in question is one which relates to the prescription of rules and regulations for future conduct, and it is not a power for affording remedies for past misconduct or other violations of legal rights. As has been pointed out in the opinions of the Supreme Court, the power thus defined is legislative in its nature; and it is well settled upon a long series of decisions by that court in the development of this subject that, when this legislative power concerns the administrative affairs of the government, it may be delegated to an officer, or a board already existing or created for the purpose, and, when so delegated, the power may be as fully exercised as the Legislature might have exercised it, subject to any limitations imposed by the Legislature itself. When a subject requires legislation for the regulation of future conduct, but the objects of it are so diffuse and variable that they cannot be distinctly apprehended and comprised in the ordinary terms of legislative classification, it is not unusual to prescribe general rules, if such do not already exist, and delegate the power to apply those rules to the varying circumstances which may arise and give occasion for control. The necessity of legislation in such form justifies its adoption; and it is not obnoxious to the Constitution, in that it delegates legislative power. Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253; Field *v.* Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Buttfield *v.* Stranahan, 192 U. S. 476, 24 Sup. Ct. 349, 48 L. Ed. 425; Union Bridge Co. *v.* United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

And it would be difficult to instance an occasion in the history of federal legislation so plainly subject to the application of this exceptional rule as the enactment of the interstate commerce law and the carrying forward of its scheme by subsequent amendments. It is manifest that some such scheme as this must have been adopted or the purpose to control carriers engaged in interstate commerce must fail. It would have been impossible for Congress to have foreseen the multitude of questions depending upon the special facts presented sometimes in one complication and sometimes in another, and declare a single rule applicable to each. The most that it could do would be to declare the general rules to indicate its purpose and to serve as guides in the determination of questions which would arise, and delegate the power of applying them to some competent public agency always in the field and ready to

entertain and dispose of controversies. And it is indispensable to this power that the commission should have the right to exercise its judgment and to form conclusions upon the facts. To enable it to do this, the statute provides that notice shall be given to interested parties, that a hearing shall be had and proofs taken. We think there is no valid constitutional objection to the law, in that legislative powers are improperly delegated.[2]

Section 3.

Limitations on the Power of the State in Rate Regulation.

MUNN *v.* ILLINOIS.

94 U. S. 113. 1876.[1]

Mr. Chief Justice Waite delivered the opinion of the court.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as

[2] See Interstate Commerce Act, § 15, as amended June 29, 1906, Appendix, p. 504.
See Interstate Com. Com. *v.* Chicago, R. I. & P. Ry. Co. (1910), 218 U. S. 88; Interstate Com. Com. *v.* Humboldt S. S. Co. (1912), 224 U. S. 474.

[1] Only an extract from the opinion is here reprinted.— Ed.

to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.[2]

REAGAN *v.* FARMERS' LOAN AND TRUST CO.

154 U. S. 362. 1894.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for

[2] See Peik *v.* Chicago & N. W. Ry. Co. (1876), 94 U. S. 164, 178.
In Stone *v.* Farmers' L. & T. Co. (1885), 116 U. S. 307, the following language is found on pages 330 and 331:
"In Munn *v.* Illinois, 94 U. S. 113, and Chicago, Burlington & Quincy Railroad Co. *v.* Iowa [94 U. S. 155], above cited, this court decided that, as to natural persons and corporations subject to legislative control, the State could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings.
"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi, expressly provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.'"

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter; insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government, and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In Chicago, Burlington & Quincy Railroad *v.* Iowa, 94 U. S. 155, and Peik *v.* Chicago & Northwestern Railway, 94 U. S. 164, the question of legislative control over railroads was presented; and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller in Wabash, St. L. & P. Ry. Co. *v.* Illinois, 118 U. S. 557, 569, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State within which a railroad company did business to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in Railroad Commission Cases, 116 U. S. 307, 331; and, while the right control was reaffirmed, a limitation on that right was plainly intimated in the following words of the chief justice:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of Dow *v.* Beidelman, 125 U. S. 680, 689. Again, in Chicago, M. & St. P. Ry Co. *v.* Minnesota, 134 U. S. 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in Chicago & Grand Trunk Railway *v.* Wellman, 143 U. S. 339, 344, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd *v.* New York, 143 U. S. 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us the records do not show that the charges fixed by the statute are unreasonable." Hence, there was no occasion for saying anything as to the power or duty of the courts in case the rates, as established, had been found to be unreasonable. It was enough that, upon examination, it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground."

These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every con-

stitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was therefore within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was, in so doing, only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc. It is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not, in the decree, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

And now what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property

was $40,000,000. It cannot be replaced to-day for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest, the stockholders have put their hands in their pockets, and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate, in cents, per ton, per mile, has decreased in 10 years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000. Can it be that a tariff which, under these circumstances, has worked such results to the parties whose money built this road, is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff. There may have been extravagance, and a needless expenditure of money. There may be waste in the management of the road, enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff, as established, is unjust and unreasonable, is supported by the ad-

mitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for 10 years steadily decreasing, until the aggregate decrease has been more than 50 per cent.; that, under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment, so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree restraining it being put in force.

It follows from these considerations that the decree, as entered, must be reversed, in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations, but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

SMYTH *v.* AMES.

169 U. S. 466. 1898.[1]

EACH of these suits was brought July 28, 1893, and involves the constitutionality of an act of the legislature of Nebraska approved by the governor April 12, 1893, and which took effect August 1, 1893. It was an act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act." Acts Neb. 1893, c. 24; Comp. St. Neb. 1893, c. 72, art. 12. The act is referred to in the record as "House Roll 33."

MR. JUSTICE HARLAN delivered the opinion of the court.

[1] Most of the statement of facts, all of the arguments of counsel and part of the opinion are omitted.— ED.

We are now to inquire whether the Nebraska statute is repugnant to the constitution of the United States.

By the fourteenth amendment it is provided that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled. Santa Clara Co. *v.* Southern Pacific Railroad, 118 U. S. 394, 396; Charlotte, Columbia & Augusta Railroad *v.* Gibbes, 142 U. S. 386, 391; Gulf, Colorado & Santa Fé Railway *v.* Ellis, 165 U. S. 150, 154. What amounts to deprivation of property without due process of law, or what is a denial of the equal protection of the laws, is often difficult to determine, especially where the question relates to the property of a *quasi* public corporation, and the extent to which it may be subjected to public control. But this court, speaking by Chief Justice Waite, has said that, while the State has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, "under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law." Railroad Commission Cases, 116 U. S. 307, 325, 331. This principle was recognized in Dow *v.* Beidelman, 125 U. S. 680, 689, and has been reaffirmed in other cases. In Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174, 179, it was said that the power of the State to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits — in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters — was "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce." In Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 418, 458, it was said: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other

persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." In Chicago & Grand Trunk Railway *v.* Wellman, 143 U. S. 339, 344, the court, in answer to the suggestion that the legislature had no authority to prescribe maximum rates for railroad transportation, said that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." In Budd *v.* New York, 143 U. S. 517, 547, the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses, in that State, took care to state, as a result of former decisions, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law." [2]

So, in St. Louis & San Francisco Railway *v.* Gill, 156 U. S. 649, 657, it was said that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." In Covington & Lexington Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 584, 594–595, 597, which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said: "A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight." And in Chicago, Burlington & Quincy Railroad *v.* City of Chicago, 166 U. S. 226, 241, it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of

[2] A paragraph dealing with Reagan *v.* Farmers' L. & T. Co., *supra*, is here omitted.— ED.

the State is a denial by that State of a right secured to the owner by that instrument."

In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the State of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: "It is, however, urged by the defendants that in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States; and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States, for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less; hence, to enforce the same rates in both

States might result in great injustice in one, while it would only be reasonable and fair in another. Comparisons, therefore, between the rates of two States, are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent. higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence a mere difference between the rates in two States is of comparatively little significance." 64 Fed. 165. In these views we concur, and it is unnecessary to add anything to what was said by the Circuit Court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company; that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth? Or must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates

for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.[3]

It appears, from what has been said, that if the rates prescribed by the act of 1893 had been in force during the years ending June 30, 1891, 1892, and 1893, the Fremont Company, in the years ending June 30, 1891, and June 30, 1893, and the Union Pacific Company, in the years ending June 30, 1892, and June 30, 1893, would each have received more than enough to pay operating expenses. Do those facts affect the general conclusion as to the probable effect of the act of 1893? In the discussion of this question the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion, and, as it bears upon each case in its important aspects, it should not be passed without examination.

[3] For a discussion of what regulation is entirely without the power of the States, what regulation is entirely subject to their control, and what regulation may be indulged in by them until such time as Congress shall legislate on the subject, see Minnesota Rate Cases (1913), 230 U. S. 352, 398 *et seq.*

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound, in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guaranties for the protection of its property. Olcott *v.* The Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation *v.* Southern Kan. Ry. Co., 135 U. S. 641, 657. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but, in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged.

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount

and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence, there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

SOUTHERN RAILWAY CO. *v.* ATLANTA STOVE WORKS.

128 Ga. 207. 1907.[1]

THE Railroad Commission of Georgia, after making a general schedule of intra-state rates for the railroads of the State, made a supplementary order contained in Circular 309, establishing rates for the carriage of stoves and fixtures between certain named points. The Southern Railway Company refused to carry for the Atlanta Stove Works according to the rates fixed by such circular, and the latter brought this action for mandamus.

EVANS, J. Many adjudications of courts of last resort have

[1] The statement of facts has been condensed and part of the opinion is omitted.— ED.

established the proposition that the presumption is that the rates fixed by the Commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary. Dow *v.* Beidelman, 125 U. S. 680; Chicago, etc., Ry. Co. *v.* Tompkins, 176 U. S. 167; Minn. & St. L. R. Co. *v.* Minnesota, 186 U. S. 257. The plaintiff in error contends that circular 309 bears internal evidence of the unreasonableness of the rates. No factor appears in this circular which may not properly enter into the problem of rate making. The circular does not fix an isolated and independent rate apart from the whole body of rates, but amends the general schedule to the extent of its provisions. It is a matter of common knowledge in the traffic world that apparently insignificant causes sometimes influence the moving of traffic. Freight heretofore passing over the road of one carrier is perceptibly diverted in another direction or transported by a different carrier. The carrier's traffic agent is ever alert to discover the cause of the diversion of profitable business, and, when such cause is supposed to be discovered, to arrange or readjust his tariff schedules in such a manner as to secure what may have been lost, as well as to increase the public patronage of his road. Rate fixing is impossible of being resolved into an exact science, because of the inharmony of basing criteria in different localities, and even in the same territory. Many factors must be considered in one instance which are wholly lacking in another case. Out of the dissimilarity of potential criteria in establishing rates grew the principle of classification. Classification has been extended to the character of the railroad, localities, commodities, amount of traffic, and many other conditions which directly affect the moving of traffic. In the recent treatise of Beale and Wyman on Railroad Rate Regulation, in chapter 18, the authors have grouped under topical heads some general bases of commodity classification, such as comparison of commodities, convenience in handling, value of the goods, car load rates, and difference in rate between classes. Classification of commodities into classes is there said to be allowable so long as it is not disproportionate. After discussing several decisions rendered by the Interstate Commerce Commission, at section 607, it is said that "the principle to be deduced from the cases which have just been discussed is that the differences in rates between the classes in a classification should not be disproportionate." From the necessity of the case, where so many elements are obliged to be considered in fixing a commodity rate as part of the general schedule of rates, it is impracticable to fix a single commodity rate without reference to rates of other commodities, as well as other factors that properly may enter into the estimate.

Chicago, etc., Ry. Co. *v.* Tompkins, 176 U. S. 167. In the case of Minneapolis & St. Louis R. R. Co. *v.* Minnesota, 186 U. S. 257, the reasonableness of the rate on coal between two intrastate points was under review. The railroad company contended that this particular rate on a tonnage basis would render freight transportation receipts less than actual operating expenses. Testimony was submitted to sustain this contention. The court, speaking through Mr. Justice Brown, said: "The principal testimony, however, was intended to show that, if the rate fixed by the Commission for coal in car load lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses. But it so appears that, if the old rate upon hard coal in car load lots agreed upon by the roads were adopted as an average rate for *all* freights, the freight earnings of the road would have been largely increased. This would indicate that the rate fixed for coal must have been above the average rate, although coal is classified as far below the average. It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the Commission there would not still be a reasonable profit upon coal so carried." And further on in the same opinion it was said: "We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular." As epigrammatically put in Smyth *v.* Ames, 169 U. S. 547: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." We do not see how this result can be obtained except from an application of the whole body of rates to the railroad's entire business within this State.

Again, if the railroad company be permitted to contest the reasonableness of an individual commodity rate apart from the whole body of rates, the courts would be called on to fix and establish independent rates for different commodities. The courts would be at the beck and call of every carrier in the State to revise, change, or modify some particular rate. The courts have no such power. "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as be-

tween the carriers and the shippers. They do not engage in any mere administrative work, but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and, if found so to be, to restrain its operation." Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362. The commission fixes a schedule of rates. Some commodity rates are higher than others, and necessarily so. The entire body of rates are prescribed with respect to their inter-relation. The low rate is presumably fixed with reference to the higher rate, and conversely; and a particular rate cannot be said to be unreasonable without showing it to be such when taken in connection with the whole body of rates. We therefore reach the conclusion that the averment of the fifteenth paragraph of the amended answer, "that the rates prescribed by circular 309 are unreasonable, in that the amount earned by your petitioner in the transportation of the articles covered by 309 between the points therein prescribed would be less than the cost of service," fails to raise an issue of fact. Since conceding the truth of the averment, for the reasons given above, the rate therein prescribed is not alleged to be unreasonable as a part of the whole body of rates prescribed by the Commission.[2]

NORTHERN PACIFIC RAILWAY CO. *v.* NORTH DAKOTA.

35 Sup. St. Rep. 429. 1915.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

By chapter 51 of the Laws of 1907, the legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. It was further provided that in case the transportation was over two or more lines of railroad it should be considered as one haul, the compensation for which should be divided among the carriers according to their agreement, or, if they could not agree, as the railroad commissioners should decide, subject to appeal to the courts. While the statutory rates governed all coal shipments, their practical application was almost solely to lignite coal.

As to the law, the state court held:

"(a) The statutory freight rate is presumed to be reasonable,

[2] See Missouri Pac. R. R. Co. *v.* Smith (1895), 60 Ark. 221.

[1] Part of the opinion is omitted.— ED.

which presumption continues until the contrary appears and the rate is shown beyond a reasonable doubt to be confiscatory.

"(b) Proof that a rate is noncompensatory — that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried — is not sufficient to establish that the rate is confiscatory in law.

"(c) In order to establish such a noncompensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience.

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that

are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.

We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The state cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost, the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. Whatever inference may be deduced from coal rates in other states, as disclosed by the record, is decidedly against the reasonableness of the rate. And it may be added that, while the

rate was found to be compensatory in the case of the Great Northern Railway Company, this was distinctly shown to be due to the peculiar conditions of the traffic over that road, the differences with respect to which were fully detailed by the state court. 26 N. D. pp. 439, 472–480, 145 N. W. 135. Nearly 90 per cent. of the total intrastate traffic in lignite coal upon the three roads was over the lines of the plaintiff's in error. It is urged by the state that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of the commodity cannot be regarded as furnishing a sufficient ground for compelling the carrier to transport it for less than cost, or without substantial reward.

The state insists that the enactment of the statute may be justified as "a declaration of public policy." In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or — as might equally well be asserted — to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. There

are many factors to be considered,— differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439; Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 313. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.

But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carriers to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state's requirements. But the decisions in this class of cases (which we have cited in the margin [2]) furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is

[2] Stone *v.* Farmers' Loan & T. Co., 116 U. S. 307; Dow *v.* Beidelman, 125 U. S. 680, 690; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339, 341; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362; Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578; Smyth *v.* Ames, 169 U. S. 466; San Diego Land & Town Co. *v.* National City, 174 U. S. 739; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167; San Diego Land & Town Co. *v.* Jasper, *supra;* Stanislaus County *v.* San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201; Knoxville *v.* Knoxville Water Co., 212 U. S. 1; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19; Cedar Rapids Gaslight Co. *v.* Cedar Rapids, 223 U. S. 665; Louisville *v.* Cumberland Teleph. & Teleg. Co., 225 U. S. 430; Minnesota Rate Cases (Simpson *v.* Shepard), 230 U. S. 352, 433; Missouri Rate Cases (Knott *v.* Chicago, B. & Q. R. Co.), 230 U. S. 474, 497; Southern P. Co. *v.* Campbell, 230 U. S. 537; Allen *v.* St. Louis, I. M. & S. R. Co., 230 U. S. 553, 556.

adequate. In St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, a statute fixing a maximum rate for passengers in the state of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad, and not to the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above-stated principle,— that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from "every mile, section, or other part into which the road might be divided." Id. p. 665. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole business governed by the rate. In Smyth *v.* Ames, 169 U. S. 466, a schedule of freight rates was involved, and, while the entire schedule was under consideration, it was recognized that in order to determine its adequacy the intrastate freight business might be segregated. Id. pp. 535, 550. The case of Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that "if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses." It was said that it was "quite evident" that this testimony had "but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried" (id. p. 266); and this conclusion effectually distinguishes the case from the one at bar.

To repeat and conclude: It is presumed — but the presumption is a rebuttable one — that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial com-

pensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

The judgments, respectively, are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.[3]

Mr. Justice Pitney dissents.

CITY OF MINNEAPOLIS *v.* MINNEAPOLIS STREET RAILWAY CO.

215 U. S. 417. 1910.[1]

Mr. Justice Day delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Minnesota, enjoining the city of Minneapolis from enforcing, as against the Minneapolis Street Railway Company, appellee, a certain ordinance of the city of Minneapolis, passed February 9, 1907, prescribing the rate of fare for the transportation of passengers over any street railway line, or lines, of the company in the city of Minneapolis.

The case was tried upon amended bill and answer. The ground alleged for injunction in the amended bill was in substance that the ordinance of February 9, 1907, violated the terms of a previous and subsisting contract, prescribing the rates of fare to be charged by the company in the city of Minneapolis. It appears in the record that the railway company was organized on July 1, 1873, and that its alleged contract arises from an ordinance of the city of Minneapolis passed July 9, 1875, ratified by an act of the legislature of the state of Minnesota passed March 4, 1879. We

[3] See Norfolk & W. Ry. Co. *v.* Conley (1915), 35 Sup. Ct. R. 437; Pennsylvania R. R. Co. *v.* Philadelphia County (1908), 220 Pa. St. 100.
Compare the opinion of Mr. Justice Brewer in Cotting *v.* Kansas City S. Y. Co. (1901), 183 U. S. 79.

[1] The arguments of counsel and part of the opinion are omitted.— Ed.

shall have occasion later on to deal more specifically with this ordinance and ratifying act.

It is sufficient for the present purpose to say that it is the contention of the company, that, by the ordinance of July 9, 1875, and the ratifying act, it became the owner of an irrepealable contract for the term of fifty years from the date of its organization, by the terms of which it had the right to charge a fare not exceeding 5 cents for each person carried on any continuous line which might be designated by the city council of the city, such continuous line, however, not to exceed 3 miles in length. The contract, it is alleged, is violated by the ordinance of February 9, 1907, requiring the sale of six tickets for 25 cents.

We therefore reach the conclusion that when the ordinance complained of, that of February 9, 1907, was enacted by the city council, the company was the owner of a valuable contract right secured to it by the ordinance of July, 1875, ratified by the enactment of the legislature of the state of Minnesota on March 4, 1879, which secured to the company for fifty years from July 1, 1873, the contract right to charge 5 cents per passenger for one continuous trip. We think that the requirement of the ordinance, that the company should operate its roads by the sale of tickets six for a quarter, as required by the ordinance of February 9, 1907, was an enactment by legislative authority which impaired the obligation of the contract thus held and owned by the complainant company. We therefore reach the conclusion that the decree of the Circuit Court enjoining the execution of the ordinance, for the reasons stated, should be affirmed.[2]

HOME TELEPHONE AND TELEGRAPH CO. *v.* CITY OF LOS ANGELES.

211 U. S. 265. 1908.[1]

MR. JUSTICE MOODY delivered the opinion of the court.

This is a suit in equity brought in the Circuit Court of the United States by the appellant, a telephone company, against the city of Los Angeles and its officers. The object of the suit is to restrain the enforcement of certain ordinances which fixed the rates to be charged for telephone service; required every person, firm, or corporation supplying telephone service to furnish annually

[2] See City of Cleveland *v.* Cleveland C. Ry. Co. (1904), 194 U. S. 517; Vicksburg *v.* Vicksburg W. W. Co. (1907), 206 U. S. 496.

[1] The arguments of counsel and part of the opinion are omitted.— ED.

to the city council a statement of the revenue from, and expenditures in, the business, and an itemized inventory of the property used in the business, with its cost and value; and provided a penalty for charges in excess of the rates fixed and for failure to furnish the required statements. The defendants demurred to the bill, the demurrer was sustained, and an appeal was taken directly to this court on the constitutional questions, which will be stated.

The ordinances complained of were enacted by virtue of the powers contained in § 31 of the city charter, which is as follows:

"(Sec. 31.) The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes, and erection of lamp-posts, electric towers, and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections; and to prohibit or regulate the erection of poles for telegraph, telephone, or electric wire in the public grounds, streets, or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets, or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone, or electric wires."

It was decided by the judge of the court below, and is agreed by the parties, that this section of the charter conferred upon the city council, in conformity with the Constitution and laws of the state of California, the power to prescribe charges for telephone service. Not doubting the correctness of this view, we accept it without extended discussion. The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The company, however, insists that the city, having the authority so to do, has contracted with it that it may maintain the charges for service at a specified standard, and that, as the rates prescribed in the ordinances complained of are less than that standard, the ordinances therefore impair the obligation of the contract, in violation of the Constitution of the United States. This is the first question to be considered, and the facts out of which the contention arises are alleged in the bill and admitted by the demurrer.

The company obtained its franchise under the provisions of a

statute of the state enacted March 11, 1901 (Stat. 1901, p. 265), which was later than the adoption of § 31 of the city charter. By proceedings conforming to this statute a franchise to construct and operate a telephone system for fifty years was sold to M. Adrian King, which, by assignment, assented to by the city, came into the hands of the plaintiff company, which constructed the works and has since operated them. The franchise was granted by an ordinance. In the view we take of the case we need do no more than state very briefly the main features of the ordinance. It grants a franchise for fifty years, which is to be enjoyed in accordance with terms and conditions named, stipulates for certain free service for the city, and the payment to it, after five years, of 2 per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts.

This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city.

It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit *v.* Detroit Citizens' Street R. Co., 184 U. S. 368, 382; Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank *v.* Billings, 4 Pet. 514, 561; Railroad Commission Cases, 116 U. S. 307, 325; Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665; Freeport Water Co. *v.* Freeport, 180 U. S. 587, 599, 611; Stanislaus County *v.* San Joaquin & K. River Canal & Irrig. Co., 192

U. S. 201, 211; Metropolitan Street R. Co. *v.* New York State Tax Comrs., 199 U. S. 1. And see Water, Light, & Gas Co. *v.* Hutchinson, 207 U. S. 385.

The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power "by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connection." This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance "to fix and determine the charges." It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject.

The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied.

SOUTHERN PACIFIC CO. *v.* CAMPBELL.

230 U. S. 537. 1913.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

It is also urged that the railroad commission act of Oregon (Laws of 1907, chap. 53), and the order in question, were void as against the Oregon & California Railroad Company, and the lessee of its property, upon the ground that the act and order impaired the obligation of the contract contained in the charter of the first-mentioned company. That company was incorporated in 1870, under the general incorporation act of Oregon, approved October

[1] The arguments of counsel and part of the opinion are omitted.— ED.

14, 1862, which, in § 34 provided: "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe." Reference is also made to the following provision of the Constitution of Oregon pursuant to which this incorporation act was enacted: "Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed but not so as to alter or destroy any vested corporate rights." (Art. 11, § 2.) The sole question presented on this branch of the case, it is said by counsel for the appellants, "is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised, regulated, and supplanted by the judgment of the state exercised through a Railroad Commission, or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts, upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable?"

As to this question, it is sufficient to say that it is well established that a general charter provision such as the one quoted, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the state through its legislature, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier. State *v.* Southern P. Co., 23 Or. 424, 432, 433; Stone *v.* Farmers' Loan & T. Co., 116 U. S. 307, 330; Dow *v.* Beidelman, 125 U. S. 680, 688; Georgia, R. & Bkg. Co. *v.* Smith, 128 U. S. 174, 181; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 455; Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 215; Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 696; Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 370. In the case of Stone *v.* Farmers' Loan & T. Co., *supra,* where the charter empowered the railroad company "from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad," and it was insisted that a subsequent statute creating a railroad commission with authority to fix maximum rates was an impairment of contract obligation, the court said: "The claim now is that by § 12" (the provision referred to) "the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of such intention. Power is

granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. . . . Consequently, all the power which the state had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness, within the limits of its general authority, as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered."

Section 4.

Operating Expenses and Maintenance.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO. *v.* TOMPKINS.

176 U. S. 167. 1900.[1]

Mr. Justice Brewer delivered the opinion of the court.

Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the question involved. It has often been said that this is a government of laws, and not of men; and by this court, in Yick Wo *v.* Hopkins, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state, or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. Railroad Commission

[1] The statement of facts and part of the opinion are omitted.— Ed.

Cases, 116 U. S. 307; Dow *v.* Beidelman, 125 U. S. 680; Georgia R. & Bkg. Co. *v.* Smith, 128 U. S. 174; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649; Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578; Smyth *v.* Ames, 169 U. S. 466.

It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.

In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld.

Such being unquestionably the law, it is obviously of the utmost importance that the facts shall be clearly and accurately found and distinctly stated by the trial court, and that those facts shall sustain the conclusion reached.

We are of opinion that neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and we are also of opinion that the process by which the court came to its conclusion is not one which can be relied upon. The court proceeded upon the theory that a comparison of the actual gross receipts of the com-

pany from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the question of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvious that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts.

But here we are confronted by the ninth statement in the findings of fact, to wit, "that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896, and 1897 was." If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible. Take the ordinary case of condemnation of real estate, the value is to be determined by the trial tribunal, whether jury or court, and yet no one is able to state the exact value. In this very case the court fixed the value of the company's property in South Dakota at $10,000,000, and yet it is impossible from the testimony to say that this conclusion was absolutely accurate, that there was testimony tending to show to a dollar such value. Beyond the figures given from the books of the company of the actual cost of doing the total business of the company there was the testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to de-

termine the difference with mathematical accuracy. Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded.

We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined.

CHICAGO AND GRAND TRUNK RAILWAY CO. *v.* WELLMAN.

143 U. S. 339. 1892.[1]

In 1889 the legislature of the state of Michigan passed an act, No. 202 of the Public Acts of that year, pages 282 and 283, by which, among other things, section 3323 of Howell's Statutes, being a part of the railroad law of that state, was amended, reducing the rate for passenger service on defendant's line. Plaintiff tendered fare according to the statute, and being refused carriage brought this action, which was tried on an agreed statement of facts. Defendant contended that the statute was unconstitutional. Judgment was rendered for plaintiff, and affirmed upon appeal by the Supreme Court of the State.

Mr. Justice Brewer delivered the opinion of the court.

On the very day the act went into force the application for a

[1] The statement of facts is condensed, and part of the opinion is omitted. — Ed.

ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered, not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries,— fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts. Judgment affirmed.

In re ARKANSAS RATE CASES.

187 Fed. 290. 1911.[1]

TRIEBER, District Judge. *Personal Injuries.* It is also claimed that complainants are not entitled to "charge in the expense of operation the sums they paid for injuries to persons." This claim

[1] Only an extract from the voluminous opinion is here reprinted.— ED.

cannot be treated seriously. It is true, as claimed by counsel, "that the people of Arkansas are not insurers of the risks of the railroad business;" but, on the other hand, such accidents cannot be wholly avoided, and, as there is no pretense that they were willful or intentional on the part of the officials of the company, they must be considered as unavoidable risks of operation of the business. Many persons and corporations engaged in industrial pursuits of a character dangerous to employés or others insure themselves against such loss, and the premiums paid therefor are charged to expense of operation. Railroads, or rather these roads, for reasons which are not explained by the evidence in these cases, but probably economic, carry their own insurance against such losses, and charge them as expense of operation, as they would otherwise charge the premiums paid for the insurance, if they obtained it from insurance companies. As these indemnity insurance companies make the charge high enough to cover the expense of the management of their business and a profit on their investment, the policy of the railroad companies is probably most economical.

PANNELL *v.* LOUISVILLE TOBACCO WAREHOUSE CO.

113 Ky. 630. 1902.[1]

HOBSON, J. In the year 1900 the appellants instituted a number of suits at law to recover penalties for the violation of sections 4799, 4801, 4803, Ky. St. Section 4799 provides that a warehouseman, in settling with a shipper, shall account to him for the net weight of the tobacco sold, including the sample; section 4801, that the warehouseman, in selling leaf tobacco at public auction, shall receive as compensation therefor $2 a hogshead from the owner or his agent; section 4803, that it shall be unlawful for the warehouseman directly or indirectly to charge the seller or owner anything by way of commission or otherwise for paying to him the money for which his tobacco is sold. Section 4807 makes the warehouseman liable to the party aggrieved in the sum of not less than $25 nor more than $100 for a violation of these provisions. Appellees are warehousemen in Louisville, Ky., and appellants are sellers of tobacco. The actions instituted by appellants sought to recover penalties for violation of the foregoing sections by the warehousemen in not accounting to the shipper for the full weight of his tobacco, and in charging him commission on the price in addition to the $2 a hogshead for selling it.

[1] Part of the statement of facts is omitted, and only one point is reprinted from the opinion.— ED.

About 175,000 hogsheads are sold annually by appellees. But a short time is taken to sell a hogshead, and it is hard to escape the conviction, from the proof, that there is a very bitter rivalry between them to secure trade, and that this rivalry is somewhat promoted by the scale of fees that are charged under the rules. In other words, the rules allow a liberal compensation, and it is a matter of importance to the warehouse to secure the trade of a customer, and in order to secure trade the houses expend large amounts in the country. If the business was not so remunerative, they could not afford to expend as much as is shown by the proof in securing it, and we do not think it can be maintained that a scale of fees which is so large as to justify the warehouseman in expending large amounts to secure trade might not be properly reduced. For we know that the larger the fee, the more the warehousemen can afford to pay out to get the trade; and it is not the policy of the law that the warehouseman should be allowed to charge a large fee against the shipper, in order that he may be able to spend a portion of it in securing the trade. To illustrate: If the fees were so large that the warehousemen could give half of them to get the business, it is manifest that this would lead to practices that ought not to be encouraged, and would be a hardship on the tobacco raiser, which the statute was designed to prevent. Of course, the proof before us does not show such an extreme case as this. But the facts shown by the evidence do not present a case showing clearly and beyond all doubt such a flagrant attack upon the rights of property as to compel the court to say that the rate prescribed will necessarily have the effect to deny just compensation for private property taken for public use.[2]

BRYMER *v.* BUTLER WATER CO.

179 Pa. St. 231. 1897.[1]

MR. JUSTICE WILLIAMS. This leads us to the second question raised, viz.: By what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily, that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the

[2] Compare on this point *In re* Arkansas Rate Cases (1911), 187 Fed. 290, at p. 316.

[1] Only an extract from the opinion is here reprinted.— ED.

legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. This whole subject was brought to the attention of the learned judge by a request that he should find, as matter of law, that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying, in reply to the request: "We have no authority for such a ruling, and it would be unjust to the consumer, who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction."

This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair, and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just.

CHICAGO AND NORTHWESTERN RAILWAY CO. *v.* DEY.

35 Fed. 866. 1888.[1]

BREWER, J. The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is

[1] Only an extract from the opinion is here reprinted.— ED.

mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagors' rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible,— and that power of the legislature over property is conceded,— yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the supreme court, the corporation to carry persons or property without reward.[2]

LONG BRANCH COMMISSION *v.* TINTERN MANOR WATER CO.

70 N. J. Eq. 71. 1905.[1]

PITNEY, V. C. I have intimated that the defendant ought not to expect, at the start, a compensatory income such as that stated by Judge Williams in the Supreme Court of Pennsylvania, and by the Supreme Court of Maine, above cited, but I do think they ought to get at the start a moderate rate of interest, say 5 per cent. on their investment after paying all expenses of operation and maintenance and a moderate allowance for depreciation in value.

This latter item as applied to the water mains is slight.

If originally laid of iron of proper quality and properly coated on the interior, they are practically immortal. They are, however, liable to diminution in carrying capacity, due to the growth on the interior of tubercles of rust. This is an unascertainable quantity, which varies materially with the quality of the iron, the character of the coating, and the characteristics of the water.

The fire hydrants, steam pumps, boilers and filters, and buildings certainly do depreciate in value each year to an appreciable extent over and above the amount which may be expended upon them for reasonable and ordinary repairs. Mr. La Monte put this depreciation at 5 per cent. on all the mains and hydrants. I think that too

[2] See Chicago, M. & St. P. Ry. Co. *v.* Smith (1901), 110 Fed. 473. Compare Minneapolis & St. L. R. R. Co. *v.* Minnesota (1902), 186 U. S. 257, 266; San Diego L. & T. Co. *v.* National City (1896), 74 Fed. 79, 87.

[1] Only an extract from the opinion is here reprinted.— ED.

great, and fix it at 1 per cent. on so much of the $847,000 as is represented by the material so subject to depreciation. Just what proportion of the whole that represents must be a mere estimate; with insufficient data I put it at $600,000.

It follows that the net income which the defendant ought to receive at the start from Long Branch should be 5 per cent. on $847,000, which amounts to $42,350, and 1 per cent. on $600,000, making $6,000, and a total of $48,350.

To this must be added the costs of maintenance and administration including ordinary repairs and taxes. Mr. La Monte had made up and submitted and been cross-examined upon a very careful estimate of those items showing the amount to be $30,000. I have carefully scrutinized it and believe it to be a fair and just estimate.

Allotting two-thirds of this to Long Branch, we have it charged with $20,000 a year.

This seems a large sum, but it must be borne in mind that the works must in their size and operation be gauged to the highest population in the crowded season, and to the extravagant use in which Long Branch indulges for street sprinkling. Taking those matters into consideration, I do not find it oppressive.[2]

CEDAR RAPIDS GAS LIGHT CO. *v.* THE CITY OF CEDAR RAPIDS.

144 Iowa, 426. 1909.[1]

LADD, J. It appears that the company had charged off its books as depreciation in the value of its property due to use the following sums: $10,000 in 1902, $20,000 in 1903, $12,000 in 1904, $10,000 in 1905, $13,000 in 1906. In computing the expense of distribution, the plaintiff's accountant, as said, included these items, while the defendant's accountant allowed for depreciation of property $.05 per 1,000 cubic feet of gas manufactured. This would make a difference in manufacturing and distributing gas sold in 1905 of $.0714 per 1,000 cubic feet, and in 1906 of $.0816. There can be no doubt as to the justice of some allowance for depreciation. A public service corporation is under no obligation to sac-

[2] "The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may in large measure be local questions to be determined upon factors, among which the most important may be (1) the cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes." Cumberland T. & T. Co. *v.* Memphis (1908), 183 Fed. 875, 877.

[1] Only one point from the opinion is here reprinted.— ED.

rifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but also to provide means for replacing the parts of the plant when these can no longer be used. "It is entitled to see that from its earnings the value of the property is kept unimpaired, so that at the end of any given term of years the original investment shall remain as it was at the beginning. It is not only the right of the company to make such provision, but it is its duty to its bond and stock holders and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued, the only method of providing for displacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stock. This course would lead to a constantly increasing variance between present value and bond and stock capitalization — a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both." This situation ought not to be brought about either by the payment of excessive dividends or the omission to exact proper prices for the output. Mayor, etc., of Knoxville *v.* Knoxville Water Co., 29 Sup. Ct. 148.

There is a wide divergence of opinion as to the amount that should be set aside for depreciation, but all the witnesses concede that their estimates are without data as a foundation, though the elements to be taken into account are enumerated. As contended, scarcely two parts of the plant will cease to be useful at the same time. Some will last but a brief period, while others may be serving their purposes for more than a century to come. Some stress is put on the possibility of enlargement and of the necessity of replacing parts with others adequate to meet increased demands, but there is no reason to think that the income will not keep pace with the extensions or enlargements. In other words, profits on the additional sales of gas will in all probability yield an adequate income on the amounts expended for the expansion of the plant. Should replacement of some of the machinery now in use prove necessary because of new inventions, this in all probability will be owing to the economy which may be effected thereby in production, and again the saving may be expected to yield a fair return for the new investment. Moreover, the rate fixed by this ordinance is not necessarily perpetual, but subject to such changes by the governing board of the city as shall be essential to meet the contingencies of the future. The expert accountant who testified in behalf of defendant allowed 5 cents per 1,000 cubic feet of gas manufactured for depreciation, and another, who had made a study of

the durability of different material, testified that if 1.7 per cent. of the value of the plant were put into a sinking fund drawing annual interest at 4 per cent. per annum, this would produce enough to replace the plant in 30 years. The amount allowed by the accountant approximates this percentage of the value, and we are of opinion that in view of the evidence adduced it will prove adequate for replacement of the different portions of the plant when this shall become necessary. Appellee insists that the average cost during the past five years should be adopted. This, including depreciation, would be $.6404 per 1,000 feet. Another item is not to be overlooked, and that is the probability that in the future the company, in view of this investigation, will be required to pay its just portion of the burdens of taxation. What the increase shall be cannot be told in advance, but it is likely to be enough to offset any decrease in the cost of fittings. The cost of gas production during the years 1905 and 1906 was much higher than for the years previous. This was not owing to the increased cost of fuel. The accountant of defendants testified that the cost of manufacturing and distribution, including allowance for depreciation, was $.57 per 1,000 cubic feet in 1902, $.5935 in 1903, $.6375 in 1904. This increase in cost was due in large part to the increase in the fittings account, such as installing stoves, meters, and the like. In 1902 there was a profit in this account of $283.99, in 1903, an expense of $972.80, in 1904 an expense of $39.60, in 1905 of $6,758.89, and in 1906 of $5,943.83. This increase of expense of fittings, etc., over profits on the sale of stoves, etc., is not satisfactorily explained. There is no reason for thinking so large an outlay as in the last two years will be required in the future, and the probable increase therein may safely be allowed to offset probable increase in taxes. Upon an examination of the entire record, we are satisfied that the cost of manufacturing, distribution, and of making collections should not exceed $.6812 per 1,000 cubic feet at the time the ordinance was enacted.[2]

[2] In Cedar Rapids W. Co. *v.* Cedar Rapids (1902), 118 Iowa, 234, 263, the same Court said:

"So, also, we may say we see no reason why plaintiff, in addition to operating expenses, repairs, and other ordinary charges, should be allowed to reduce the apparent profits by deductions for a restoration or rebuilding fund. The setting aside of such a fund may be good business policy, and, if the company sees fit to devote a portion of its profits to that purpose (though, as we understand the record, no such fund has yet been created), no one can complain; but it is in no just sense a charge affecting the net earnings of the works. To hold otherwise is to say that the public must not only pay the reasonable and fair value of the services rendered, but must, in addition, pay the company the full value of its works every forty years — the average period estimated by plaintiff — for all time to come."

COAL AND COKE RAILWAY CO. *v.* CONLEY AND AVIS.

67 W. Va. 129. 1910.[1]

POFFENBARGER, J. There are only two items in the statement of expenses that might possibly include money that ought not to be deducted from the income for the purposes of the bill. They are the items designated "Maintenance of Way," amounting to $127,059.01, and "Maintenance of Equipment," amounting to $166,207.64. Under these two headings, there might be included the cost of improvements upon the roadbed and track and of new or additional rolling stock. It is easy to see how a railroad company, if permitted to include such costs in what are designated as expenses of Maintenance of Way and Maintenance of Equipment, and other improvements, could absorb all, or a large portion, of its earnings in the cost of betterments of its property and be in a position in almost any year to say it is not earning a fair return on its investment. The cost of betterments is obviously capital invested, and, if taken out of the earnings of the road, ought to be regarded, for the purposes of a case of this kind, as a part of the net earnings. Railroad Co. *v.* United States, 99 U. S. 402, 420. It is not properly chargeable to operating expenses. On the contrary, it is net profit earned. Of course the railway company may do what it pleases with its profits, but if it sees fit to devote them to the improvement of its road, or the building of branch lines, instead of declaring dividends or paying interest on its indebtedness, it cannot be heard to say it has not earned them. Some criticism of these two items in the statement is found in the discussion of both the bill and the evidence, but we do not think the Court could say, upon the demurrer to the bill, in view of the amount invested, that they are out of proportion. The magnitude of the cost of maintaining a new railroad in a mountainous section of the country, as well as that of maintaining the efficiency of rolling stock, is obvious to all. This railroad is 183 miles long and, exclusive of rolling stock, cost something over $5,000,000.00, while its rolling stock, owned and leased, cost something over $1,500,000.00. For ten months the cost of Maintenance of Way amounted to only about two per cent. of the amount invested in the railroad, and of Maintenance of Equipment to only about eleven per cent. of the value of the rolling stock. The charge for general expenses is comparatively light, being only $32,290.11 for that time. It is impossible that extravagant and disproportionate sums could have

[1] Only an extract from the opinion is here reprinted.— ED.

been paid out of this amount to general officers as salaries and in discharge of other general expenses.[2]

SOUTHERN PACIFIC CO. *v.* BOARD OF RAILROAD COMMISSIONERS OF CALIFORNIA.

78 Fed. 236. 1896.[1]

The Attorney General objected to complainants' figures as to operating expenses, because they included the sum of $654,826.81 for improvements and betterments.

McKENNA, Circuit Judge. The abstract legality of such charge is established by the Reagan Case. The same contention was made there, and a deduction of the sum of $302,085.77 was claimed to have been charged to operating expenses, whereas it was expended for "Cost of road, equipment, and permanent improvements." Mr. Justice BREWER, commenting on the claim, said:

"Again, the sum of $302,085.77 appears in that table, under the description 'Cost of road, equipment, and permanent improvements, admitted to have been included in operating expenses,' and is added to the income as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails except as included within this amount. Now, it goes without saying that, in the operation of every road, there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called 'permanent improvements,' or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of 'Renewals of rails and ties,' is stated the number of tons of 'New rails laid' on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company."

[2] See City of Erie *v.* Erie G. & M. Co. (1908), 78 Kan. 348, 354.

[1] Only one point from the opinion is here reprinted, together with a brief statement of the point in controversy.— ED.

Substantially to the same effect is Union Pac. Ry. Co. *v.* U. S., 99 U. S. 402. In the latter case the court was called upon to interpret that clause of the act of 1862 in aid of the construction of the Union Pacific Railroad, which provided that "after said road is completed, and until said bond and interest are paid, at least 5 per cent. of the net earnings of said roads shall also be applied to the payment thereof." It may be said that there were several elements in that case which are not in the case at bar, but, nevertheless, the remarks Mr. Justice Bradley made are substantially applicable. Speaking of when a railroad is completed, he said:

"In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail or iron bar, laid on wooden stringpieces, resulting in what was known in former times as 'snake heads'; the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail, and, finally, the H rail, which itself passed through many successive improvements. Finally, steel rails, in the place of iron rails, have been adopted as the most perfect, durable, safe, and economical rails on extensive lines of road. Bridges were first made of wood, then of stone, then of stone and iron. Grades originally crossed, and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over or under intersecting roads. A single track is all that is deemed necessary to begin with; but now no railroad of any pretensions is considered perfect until it has, at least, a double track. Depots and station houses are, at first, mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first-class railroad."

And, declaring what are proper expenditures, he further said:

"Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earnings in order to arrive at the 'net earnings,' as this expression is to be understood within the meaning of the act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid

out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed. . . . We are disposed to agree, therefore, with the judge who delivered the concurring opinion in the court below, that the twenty-seventh item of expenditure, as stated in the table of expenses in the eighteenth finding, entitled 'Expenditures for sta-

tion buildings, shops,' etc., is a charge that may properly be made against earnings; since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account."

The same idea is variously illustrated in the following cases: U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455; St. John *v.* Railway Co., 22 Wall. 136; Railroad Co. *v.* Nickals, 119 U. S. 296, 7 Sup. Ct. 209; Warren *v.* King, 108 U. S. 389, 2 Sup. Ct. 789; Mobile & O. R. Co. *v.* State of Tennessee, 153 U. S. 495, 14 Sup. Ct. 968; Barnard *v.* Railroad Co., 7 Allen, 512; Minot *v.* Paine, 99 Mass., 106, 107; Railway Co. *v.* Elkins, 37 N. J. Eq. 273; Dent *v.* London Tramways Co. 16 Ch. Div. 344.[2]

ILLINOIS CENTRAL RAILROAD CO. *v.* INTERSTATE COMMERCE COMMISSION.

206 U. S. 441. 1907.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Commission finds that the net and gross earnings of the appellants have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" And it was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test; but it cannot be said, even if the commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating

[2] See Metropolitan T. Co. *v.* Houston T. C. R. R. Co. (1898), 90 Fed. 683, 690.

[1] Only an extract from the opinion is here reprinted.— ED.

expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. But it is insisted that Union P. R. Co. *v.* United States, 99 U. S. 402, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers. It was concerned with the construction of the words "net earnings" in an act of Congress, 5 per cent. of which earnings were provided to be applied annually to a loan by the government to the railroad. Considering the provision of the act and its purpose, it was concluded "that the true interest of the government" was "the same as that of stockholders, and would be subserved by encouraging a liberal application of the earnings to the improvement of the works." "It is better," it was said, "for the ultimate security of the government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails, that $100 should be spent in improving the works, than that it should receive $5 towards the payment of its subsidy. If the 5 per cent. of net earnings, demandable from the company, amounted to a new indebtedness, not due before, like a rent accruing upon a lease, a more rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The amount of the 5 per cent. and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the government loses nothing thereby. The only result is, that a less amount is presently paid on its debt, while the general security for the whole debt is largely increased." The interest of the government in the improvement of the road was even greater than that of a stockholder. This was manifest from its munificent gift of lands, in addition to its generous loan of credit. As benefactor of the road and as creditor of it, as a government concerned with the development of the country, as a money lender concerned with the extent of security, "the true interest" of the United States might be that revenue should be applied to improvements. Payment of the debt was only postponed, not denied, and this and the other considerations might well

determine the construction of words in the statute which were capable of different meanings. But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

PUGET SOUND ELECTRIC RAILWAY *v.* RAILROAD COMMISSION OF WASHINGTON.

65 Wash. 75. 1911.[1]

MORRIS, J. It is unquestionably true that the railway company is not bound to see its property gradually deteriorate in value and earning power without making provision out of its earnings to keep its usefulness unimpaired; and that it can properly charge an annual sum to care for necessary depreciation and waste, and have such sum allowed in any determination of what is a proper return upon its investment to be approximated in fixing its rates of carriage. But we cannot concede that in so doing it can make the traffic of any future year or years bear all the burdens of the deterioration of past years. Each year should carry the burden of its own wear and tear, and thus, when renewals become necessary, the burden is equally borne by all contributing features. As we read it, the Supreme Court of the United States has so held in Knoxville v. Knoxville Water Co., 212 U. S. 1, 14, where, in treating a like question, it is said: "If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past." Accepting, therefore, the contention of appellant, that it is shown that from $140,000 to $160,000 will be required annually for the next three to five years for renewals and

[1] Only an extract from the opinion is here reprinted.— ED.

replacement, such an expenditure will not be made necessary by the deterioration and waste of these years alone; but the conditions necessitating renewals and replacement are the result of the years of wear and tear that have gradually taken place since the operation of the road first began, and each year contributing to such a condition should be charged with its proportionate share of the burden. That 25 per cent. of the earnings is a sufficient sum to be set aside each year as a depreciation and renewal fund is clearly established by the testimony; and, had this sum been so set apart each year, there can be little doubt but that the company would now have on hand a sufficient amount to care for all its present and future needs properly chargeable to such fund. While the question is more of an economic than a legal one, and hence difficult of determination in a judicial inquiry, we are satisfied that no injustice has been done appellant in this finding.

THE MINNESOTA RATE CASES.

230 U. S. 352. 1913.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

Apportionment of expenses.— As already stated, it was held in dividing the freight operating expenses, that the cost of doing the intrastate freight business was two and one-half times that of doing the interstate freight business. That is to say, the division of expenses was made according to ton-miles, interstate and intrastate, after the intrastate ton-miles had been increased two and one-half times.

The substantial question is whether the proof established this extra cost with that degree of certainty which is requisite to support a decree invalidating the state rates.

It appeared that the cost of intrastate business was not kept separately or set up in the accounts or statistics of the company.

The president of the company testified as to his judgment in the matter, which was based, in the absence of such accounts, upon the general facts of operation. His testimony was supported by that of other eminent railroad men, who testified in the Great Northern and Minneapolis and St. Louis cases. The elements entering into the greater expense of doing intrastate business were defined to be: That the average haul was shorter, being (in the case of the Northern Pacific) 104.52 miles for intrastate transportation as against 485.3 miles for interstate transportation; that the state business had to be handled twice at terminals; that the local

[1] Only one point from this voluminous opinion is here reprinted.— ED.

short-haul business used most valuable terminal facilities in order to obtain its proper handling from the larger distributing centers, and used those facilities to a greater extent for the tons handled than did the longer through business; that the amount of clerical and warehouse labor in connection with the local business was much greater than in the case of the long-haul through business; that the chances of damage were greater in the short-haul business because of the greater number of individual transactions; that in the short-haul business there was an excess of equipment for loading and unloading; that local or way freight trains were "loaded lighter"; that the wear and tear on the local trains was greater because of frequent stopping and starting; that there was increased switching, resulting in greater damage to equipment and tracks; that the local train was generally on the road more hours than a through train, and therefore consumed more coal; that in the smaller stations the amount of shifting was large; that many of the local trains carried passengers, involving two stops at each station, one for passengers and the other for the local freight work; that the manner of operation of local trains increased the chances of injury to employees; that the short-haul business moved irregularly and spasmodically, and that its facilities were worked at their full capacity only for limited periods.

From these considerations, which were elaborated in the testimony, the witness reached the conclusion that the "so-called local short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul through interstate business." In the Great Northern Case, the witnesses expressed the opinion that the extra cost of intrastate freight was three or four times greater than that of the interstate freight. One witness said that it would be from four to six times. These estimates, it is understood, had relation to the cost per ton mile.

The appellants do not dispute that business carried for short distances on local trains is more expensive than the handling of other business, but it is insisted that this is due solely to the different train service that it receives. It is said that all through trains start from divisional points and run from one end of the division to the other without stop; that the local trains are made up of cars carrying business destined for points intermediate the termini of the division, and take up all traffic originating at the intermediate stations; that the word "local," as applied to these trains, is not synonymous with intrastate, but that the local trains carry a large part of the interstate traffic, both in receiving and distributing it; and that by far the greater part of the extra cost of the local train service is properly chargeable to interstate busi-

ness. It is also insisted that so far as this extra expense can be charged to intrastate business, it is adequately met by the additional revenue of that business, which per ton mile, as compared with the interstate business, is as 1.4387 to 1.0000.

To establish these propositions, and to meet the testimony of the complainants' witnesses, the appellants introduced an elaborate series of calculations, made by a professional accountant, which were deduced from the results of an extended examination of the records of the companies. The witness made computations as to the character of the freight on each road, dividing it between through and local freight upon each operating division, and then subdividing it between intrastate and interstate freight. It is contended by the appellants that these calculations are sufficient to show that in the case of the Northern Pacific, about 91 per cent. of the freight on through trains was interstate and about 9 per cent. intrastate, and that on the local trains the interstate freight amounted to 68.67 per cent., and the intrastate, 31.33 per cent. Calculations of this witness were also introduced, showing his division of the total expenses between the passenger and freight business, and then in each department between the interstate and intrastate business; and by means of these, it was estimated that, under the rates in question (assuming them to have been applied to the business of the fiscal year ending June 30, 1907, to which the calculations were directed), the net profits on the intrastate business as a whole would have been slightly more than 6 per cent. upon an amount equal to the share of property value attributed to that business by the master's estimate and apportionment of total value.

These computations are assailed by the appellees as inaccurate and as based upon erroneous estimates. We shall not go into the details, and, for the present purpose, we may assume that the appellees are right in their criticism.

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of intrastate business, while entitled to respect as expressions of opinion, manifestly involve wide and difficult generalizations. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation, and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of the

freight service, including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively, and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost as there may be, of intrastate business, may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, but the company, having assailed the constitutionality of the state acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion.

We need not separately review the findings with respect to the division of passenger expenses, as the same considerations are involved, with the distinction, however, that the extra cost attributed to the intrastate business is relatively small as compared with that charged to intrastate freight. And, in view of the conclusions reached on the controlling questions we have considered, we express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments.

For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account. During the test year the entire revenue, as found, from the intrastate business, passenger and freight, amounted to $2,897,912.26. All the rates in question were in force save the commodity rates, and it is further found that the loss that would have accrued in intrastate commodity business, by the application of the commodity rates which were under injunction, would have amounted to $21,493.67.

As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill.[2]

Section 5.

The Capital upon Which a Return Should Be Earned.

AMES *v.* UNION PACIFIC RAILWAY CO.

64 Fed. 165. 1894.[1]

Brewer, Circuit Justice. In each of these three cases, respectively, the plaintiffs are stockholders in the corporation first named therein as party defendant. In the first the defendants are the Union Pacific Railway Company, a corporation created under the laws of congress, and owning and operating a railroad partly within the limits of the state of Nebraska; the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company, and the Kansas City & Omaha Railroad Company, corporations organized under the laws of the states of Kansas and Nebraska, whose stock is substantially owned and whose lines are controlled and operated by the Union Pacific Railway Company and certain officers of the state of Nebraska, constituting its board of transportation, together with the secretaries thereof. In the second the defendants are the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of the states of Illinois, Wisconsin, and Iowa; the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation organized under the laws of the state of Nebraska; and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, a corporation organized under the laws of the states of Minnesota and Nebraska,— both of which companies are owned and their roads operated by the Chicago & Northwestern Railroad Company; and, in addition, the board of transportation of the state of Nebraska, and its secretaries. In the third case the defendants are the Chicago, Burlington & Quincy Railroad Company, a corporation organized and existing under the laws of the states of Illinois and Iowa, which owns, controls, and

[2] See Woods *v.* Vandalia R. R. Co. (1913), 231 U. S. 1.

[1] Part of the opinion is omitted.— Ed.

operates, in the name of the Burlington & Missouri River Railroad Company in Nebraska, certain lines within that state; and in addition the state board of transportation, and its secretaries.

What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,— injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property — the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds — is not to be ignored, even though such sum is far in excess of the present value. It was said in the case of Reagan *v.* Trust Co., 154 U. S. 412, 14 Sup. Ct. 1059:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others."

It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads. Take the Union Pacific Railway, for illustration. At the time the government created the corporation, to induce the building of this transcontinental road through a largely unoccupied territory, it loaned to the company $16,000 a mile; taking as security therefor a second lien on the property, and granting to the corporation the right to create a prior lien to an equal amount, which was done. There is testimony tending to show that the road in Nebraska could be built to-day for $20,000 a mile. Would it be full justice to the government, would it satisfy the common sense of right and wrong; would it be reasonable, for the state of Nebraska to so reduce the rates that the earnings of the road would only pay ordinary interest on $20,000 a mile, and so, the holders of the first lien being paid their interest, the government be forced to be content with only interest on one-fourth of its investment? Or, to put the case in a little stronger light, suppose the promoter of this enterprise had been some private citizen, who had advanced his $16,000 a mile as a second lien, and that the road could be constructed to-day for only $16,000 a mile. Would it be reasonable and just to so reduce rates as to simply pay to the holders of the first lien reasonable interest, and leave him without any recompense for his investment? Is there not an element of equity which puts the reduction of rates in a different attitude from the absolute taking of the property by virtue of eminent domain? In the latter case, while only the value is paid, yet that value is actually paid, and the owners may reinvest, and take the chances of gain elsewhere, whereas, if the property is not taken, the owners have no other recourse than to receive the sum which the property they must continue to own will earn under the reduced rates. Considerations such as these compel me to say that I think there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the legislature are just and reasonable, and that often many factors enter into the determination of the problem. Obviously, however, the effect of the reduction upon the earnings is the first and principal matter to be considered. This is a matter of computation. The power of regulating railroads is often said to be a legislative power vested in the law-making body, to be exercised for the general welfare. Within the term "regulation" are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof,— matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing

upon the rights of the owners of railroads. But within the scope of the word "regulation," as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation, in this sense, is attempted, it necessarily affects the property interests of the railroad owners; and it is "regulation," in this sense of the term, that we are to consider in the present cases.

There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this: The various companies are doing an interstate as well as a local business. If these roads were wholly within the state, and only local business done by them, the computation would be much simplified, and the effect of the reduction in rates upon the property more easily disclosed. But all of these roads are interstate roads, and a large portion of their business is interstate business. Some of it is local business in other states than Nebraska. Now, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because, if the legislature of Nebraska can put in force this tariff for local business, the legislatures of other states through which these roads run, and the congress of the United States, may make corresponding reductions in the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy all earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger tariff, but only a maximum for freight rates. So we cannot place all the local expenses over against all the local receipts, and draw our conclusions therefrom. We have an attempt by the legislature to prescribe a maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable, and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this, we must ascertain what it costs to carry this local freight, what the receipts have been therefrom, and what reduction will be made in such receipts by the application of this act, and then we must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road. From these computations, we may see whether the reduction made by this act in the local freights, if applied to all the company's business, would leave any compensation to the owners, and, if so, how much. Obviously, the problem

thus presented is one of exceeding difficulty. Fortunately, we have in Mr. Dilworth, the secretary of the state board of transportation, one of the defendants' witnesses, a gentleman whose competency and credibility are unchallenged. In the computations which I have made, I have relied mainly on his figures.

The conclusion to which I have come is that, having regard to the present condition of affairs in the state, the present volume of business done over these roads, and any probabilities of an early change in that volume, a reduction of 29½ per cent. in the rates for local freight is unjust and unreasonable to those who have invested their money in these railroad properties. I appreciate fully the embarrassments and difficulties attending an investigation of this kind. I am reluctant, as every judge should be, to interfere with the deliberate judgment of the legislature. I have taken much time to study this case in all its relations, and have come, though reluctantly, to the conclusion I have stated, and am therefore constrained to order decrees in behalf of the plaintiffs, staying the enforcement of this tariff upon the companies named in the bills. It may be said that, even if furnishing no reasonable remuneration to-day, the result might be different under an increase of business. That, of course, is possible; and it may be that, as the volume of business increases, the time will come when the rates fixed by this house roll 33 will be reasonable and just. So there should be entered, as a proviso to the decrees, that leave is reserved to the defendants, at any time that they are so advised, to move the court for a reinvestigation of the question of the reasonableness of these rates.[2]

[2] In Pennsylvania R. R. Co. *v.* Philadelphia County (1908), 220 Pa. St. 100, the Court said, at page 115: "What is a fair profit is a complicated and difficult question, but there are certain elements that are plainly to be regarded to avoid injustice, such as the original investment, the risks assumed at that time, the returns as compared with other enterprises as nearly similar as may be, the cost of maintenance and improvement, the prospects of increase and the present value in view of the preceding elements. Injustice is done by anything that fails to consider these, and to deal equitably with the private as well as the public interests involved. It is not necessarily regulated by what others would now make the venture for, under the present circumstances and with present knowledge. The public having long reaped the incidental profits from the development of the country by the enterprise and venture of capital, in the increased value of land, the opening of new and wider markets for crops and manufactures and the facility of intercourse and exchange for persons and property, the courts should not now ignore this aspect of the subject in considering the question of injustice to the corporators."

SAN DIEGO LAND AND TOWN CO. *v.* CITY OF NATIONAL CITY.

74 Fed. 79. 1896.[1]

Ross, Circuit Judge. The municipality known as "The City of National City" having, through its board of trustees, established by ordinance the rates at which the complainant corporation should furnish the city and its inhabitants with water for domestic purposes and purposes of irrigation, for the year commencing July 1, 1895, and ending July 1, 1896, the complainant commenced this suit for the purpose of obtaining a decree of this court adjudging that the provisions of the constitution and laws of the state of California pursuant to which the proceedings by the board of trustees of the defendant corporation fixing the rates were had, be declared to be in violation of the fourteenth amendment to the constitution of the United States, and that the rates so established be, on that ground, annulled, or, in the event the court shall determine that the provisions of the constitution and laws of the state of California do not contravene the constitution of the United States, then that the rates fixed by the board of trustees of the defendant corporation be decreed to be arbitrary, unreasonable, and unjust, and for that reason void, and their enforcement enjoined, and that the board of trustees be ordered and required to adopt a new and reasonable rate of charge, and that it be decreed that the complainant corporation is entitled to charge and collect for "water rights," at reasonable rates, as a condition upon which it will furnish water to the inhabitants of the municipality for the purposes of irrigation, independent of the rates fixed by the board of trustees for water sold and furnished by the company.

To compel the complainant to supply the people of the municipality with water acquired by it without just compensation would manifestly be nothing short of confiscation. To what extent municipal authorities may go in that direction, without reaching the prohibited point, has never yet been definitely fixed by judicial decision, but that the power has a limit has been decided. Thus, in Reagan *v.* Trust Co., 154 U. S. 362–399, 14 Sup. Ct. 1047, the supreme court said:

"It is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the con-

[1] Part of the opinion is omitted.— ED.

stitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public use without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In the same case the court said that:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

In the subsequent case of Ames *v.* Railway Co., 64 Fed. 165, 177, Mr. Justice Brewer, sitting in the circuit court, and having under consideration an act of the legislature of Nebraska prescribing the maximum rates for transportation of freight by railroads within that state, said:

"What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,— injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was

seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which [it] would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if under them there is earned by the railroad company a fair interest on the actual value of the property."

In Spring Valley Waterworks *v.* City of San Francisco, *supra,* the supreme court of California, in speaking of the provision of the constitution of that state here in question, held that, in order to justify the court in setting aside the rates fixed by a municipal corporation, "there must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." 82 Cal. 306, 22 Pac. 910, 1046. To the latter rule,— that is to say, that there must be actual fraud, or its equivalent, on the part of the municipal authorities, in order to justify a court in adjudging the rates established by them unreasonable,— I cannot yield assent. The same court, in the same case, in construing the constitutional provision, said:

"When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty, and within the jurisdiction, of the board. To fix rates not reasonable, or compensation not just, is a plain violation of its duty."

In the case of Spring Valley Waterworks *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. 48, Chief Justice Waite, in speaking of the same constitutional provision, said:

"By the constitution, and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their official determination."

The court further observed that it was not necessary, in that case, to determine "what may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable."

It is obvious, I think, that it must be held, either that the right of judicial interference exists only when the schedule of rates established will fail to secure the owners of the property *some* compensation or income from their investment (however small), or else that the court must adjudicate, when properly called upon to do so, whether the rates established by the municipal authorities are so

manifestly unreasonable as to amount to the taking of property for public use without just compensation. Undoubtedly, every intendment is in favor of the rates as established by the municipal authorities. But as it is firmly established that it is within the scope of judicial power, and a part of judicial duty, to inquire whether rates so established operate to deprive the owner of his property without just compensation, it seems to me that it logically follows that, if the court finds from the evidence produced that they are manifestly unreasonable, it is its duty so to adjudge, and to annul them; for it is plain that if they are manifestly unreasonable they cannot be just. In the solution of that problem many considerations may enter; among them, the amount of money actually invested. But that is by no means, of itself, controlling, even where the property was at the time fairly worth what it cost. If it has since enhanced in value, those who invested their money in it, like others who invest their money in any other kind of property, are justly entitled to the benefit of the increased value. If, on the other hand, the property has decreased in value, it is but right that those who invested their money in it, and took the chances of an increase in value, should bear the burden of the decrease. In my judgment, it is the actual value of the property at the time the rates are to be fixed that should form the basis upon which to compute just rates; having, at the same time, due regard to the rights of the public, and to the cost of maintenance of the plant, and its depreciation by reason of wear and tear. If one has property to sell, it is its present value that is looked to, one element of which may very properly be its cost; but one element only. So, too, if one has property to lease, it is its present value, rather than its cost, upon which the amount of rent is based. And if, as said by Mr. Justice Brewer in Ames *v.* Railway Co., *supra,* the public were seeking to condemn the property in question for a greater public use, if that be possible, its present value, and not its cost, is that which the public would have to pay. It follows, I think, that, where the public undertakes to reduce the rates to be charged for the use of such property, it is its present value, and not its cost, that must be taken as a basis upon which to fix reasonable and just rates; having due regard to the cost of its maintenance, to its depreciation by reason of wear and tear, and also to the rights of the public. If, upon such a basis, a fair interest is allowed, no just cause of complaint can exist.[2]

[2] "If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but

SMYTH *v.* AMES.

169 U. S. 466. 1898.

Supra, p. 243.[1]

LOUISVILLE AND NASHVILLE RAILROAD CO. *v.* RAILROAD COMMISSION OF ALABAMA.

196 Fed. 800. 1912.[1]

JONES, District Judge. In reference to the question of value with the view of rate regulation, the most reliable test ordinarily is the cost of the reproduction of the road as it exists. I say "ordinarily" because there may be instances, which is not the case here, where by reason of paralleling the road by a new road, and diverting its business or from other causes, its value may be far less than what it will cost to reproduce it as it is at the time of the inquiry. The original cost of a road may in some cases reflect light on, or even determine, the present value, as when it is of very recent construction. But ordinarily it is of little assistance in that regard, since many items of value may be donations by the government or by individuals, as is the case of the south and north, or the road may have been built long before the

the use for the public benefit at less than its market value?" MR. JUSTICE BREWER, in Reagan *v.* Farmers' L. & T. Co. (1894), 154 U. S. 362, 410.

"The judicial test of market value depends upon the fact that sales of similar property have been and are being made at ascertainable prices. But such property as this is not so sold, at least, not often enough to furnish a fair criterion; and the very fact of governmental regulation would necessarily control the price. Until the rates are fixed no one can say how much the property would sell for, and therefore that price cannot be ascertained as a basis for fixing those rates." VAN FLEET, J., in San Diego Water Co. *v.* San Diego (1897), 118 Calif. 556, 568.

[1] "The master found the value of the entire railroad to be $93,385,341.32, this estimate of the value of the railroad being based, as has been stated, on the amount of outstanding stock and bonds. Clearly this method of reaching the value of the railroad was unsatisfactory, and does not comply with the rule laid down in Smyth *v.* Ames, *supra*.

"We think it unnecessary to consider some other questions discussed in the case because the judgment of the Circuit Court was evidently based upon the matters which have been referred to above; that is (1) the manifest error of the master in failing to allow any presumption in favor of the correctness of the commission's action, (2) the failure on the part of the railway company to show the cost of service in handling the particular commodity involved here, and (3) the action of the master in basing the value of the railway company's property in Louisiana on the amount of stock and bonds outstanding and therein failing to comply with the rule announced by the Supreme Court as to what should be considered in reaching the fair value of railroad property." NEWMAN, J., in Texas & P. Ry. Co. *v.* R. R. Com. of La. (1911), 192 Fed. 280, 286. See Steenerson *v.* Great N. Ry. Co. (1897), 69 Minn. 353, 373; Fuhrman *v.* Buffalo G. E. Co. (1913), 3 P. S. C., 2d D. of N. Y. 739, 767.

[1] The statement of facts and a large part of the opinion are omitted.— ED.

period of inquiry at greatly less or greatly higher prices than those prevailing at the time of the inquiry. Or its original cost might be involved in obscurity, and may include the cost of abandoned or destroyed portions of the property, which should not figure in the inventory for the present time, or the road may have been bought at a forced sale in times of panic at a nominal price or in inflated times at a corresponding price; or the road, costing little originally, may have developed from many contributing causes into being property of great value. And in every case, after finding the original cost, when possible to be done, the question would still have to be solved as to whether such original cost is the same as the present value, which would involve the determination of the present value for such comparison independent of original cost, and in no other or better way than on reproduction values.

The market value of bonds and stocks, while shedding in some cases light on the question of present value, cannot except in a very slight measure indicate what that value is as a matter of fact. The market value of stocks and bonds merely shows the public estimate of the value of the whole property contributing to the income, which may, as in the case of the Louisville & Nashville Railroad, embrace millions of dollars of property not used as a common carrier. And this public opinion is also open to the influences of stock jobbing manipulation and artificial bookkeeping, without the advantages of sworn inventories and the precise testimony of competent and disinterested witnesses on exact inventories of existing property. A road may have a small amount of stock compared to its property, as in the case of the Louisville & Nashville Railroad, and it may have no bonds or a large amount of bonds against its property and the two combined may not, with premiums or discounts taken into consideration, indicate with any accuracy the present values of the property invested in the business and used as a common carrier. Therefore, while looking at all collateral matters reflecting light on the subject, the court regards the reproduction cost as the final test of present value.

Under inquiry 18 in the South & North Case the special master reports at page 72 *et seq.* the cost of reproducing the railroad and other properties, after deducting $328,419 from complainants' figures, for the years named, as follows:

Year ending June 30, 1906	$20,041,714.84
Year ending June 30, 1907	21,077,210.17
Year ending June 30, 1908	22,077,003.12
Year ending June 30, 1909	22,151,800.36
Year ending June 30, 1910	23,372,752.27

Under the same special inquiry 18 at page 112 *et seq.*, in the Louisville & Nashville Case, the master reports the cost of reproducing the railroad and other properties, including equipment used as a common carrier, after making deductions from complainants' estimates of $674,673.92, for the years named, as follows:

Year ending June 30, 1906	$41,258,565.60
Year ending June 30, 1907	43,039,940.60
Year ending June 30, 1908	40,800,349.22
Year ending June 30, 1909	41,194,742.68
Year ending June 30, 1910	41,443,462.39

The respondents urged before the master all the objections now set up in the exceptions filed to his reports as to these values, and they were noticed seriatim, discussed, and disposed of by the master as shown in his reports. After considering the exceptions, I approve and confirm the findings of the master on the questions of values and cost of reproduction, and overrule the exceptions in that regard of respondents and complainants, and approve and confirm the master's reports thereon.

One of the objections of the respondents is that the estimates were based on the prices of 1907 when they were made, and that they were then unusually high. This is disposed of by the point that present values are required to be taken and used in determining present and prospective rates. Cotting *v.* Kansas, 183 U. S. 91, 22 Sup. Ct. 30, 46 L. Ed. 92; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19–52, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; Stanislaus County *v.* J. C. & I. Co., 192 U. S. 215, 24 Sup. Ct. 241, 48 L. Ed. 406. And by the fact that the proof satisfactorily shows that the reconstruction could not have been effected from 1907 to 1910 at less than the estimates used. Record, S. & N. A. 116, 118, 368, 417, 430, 432, 497, 501; Record, L. & N., 365–367.

It is insisted that in reproduction estimates the enhanced value of property between the time of the original location of a railroad through a wilderness or marsh, it may be, is not to be taken into account 40 or 50 years afterwards, when civilization, perhaps largely the result of the expenditures and operations of the road, has increased original values a hundredfold. Suppose a road is located when original cost is fabulously inflated, and the course of events brings things down to their intrinsic worth, upon whom does the loss fall? It is usually understood that the state does not make up such losses to its citizens. And, vice versa, when minerals are discovered, or oil wells developed on lands, does not

the owner of the land own its product? And how are tax values estimated? Do the officers take the value when land is first entered and cleared or when it has been improved and become a town site? The law is perfectly settled, with the obvious view of the matter, that increments and losses alike attach to ownership as to duties and rights pertaining to property. Willcox *v.* Con. Gas Co., 212 U. S. 52, 29 Sup. Ct. 192, 53 L. Ed. 382; Stanislaus *v.* Irrigation Co., 192 U. S. 215, 24 Sup. Ct. 241, 48 L. Ed. 406; San Diego Land Co. *v.* National City, 174 U. S. 757, 19 Sup. Ct. 804, 43 L. Ed. 1154. And this just rule has its balances and adjustments making it not oppressive to the public in any case. It is to be noticed, too, that the rates in fact usually diminish with the increase in property values, because the increase of business dominates values and justifies lower rates; but, be that as it may, the rule of giving to the owner the increments of value and subjecting him to the losses in values has the unequivocal sanction of the law.

The respondents except to the value of the franchise in the Louisville & Nashville Case on the ground that there is no evidence of the value in the record. Exception 10, L. & N. Case. And in the South & North Case, on the ground that "the valuations are erroneous and excessive." Exception 4, South & North Case.

As to the amount of valuation, the undisputed proof is that it is the tax valuation at 60 per cent. of real value brought up to par or 100 per cent. This could not be excessive if the tax value was 60 per cent. of the real value, and the uncontradicted proof is to that effect, and the proof is that it is not excessive. As to the factum of evidence being in the record of the value, it is shown that the law charged the State Tax Commission with the duty of assessing the franchise for taxation, and they did so and fixed the value at 60 per cent. of the real value, and it is shown what these assessments were. Record, L. & N. Case, 1927, 1928–1960; Record, S. & N. Case, 1389, 1400, 1598, 1599, 2622–2627, 2628, 2629, 2644–2648.

The assessments relied on were state valuations by officers specially delegated to make them, and not merely to receive the returns of the taxpayer. They are therefore competent evidence of probative worth. Wigmore on Evid. § 1640; Elliott on Evidence, § 1312; Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. Ed. 882. As to the propriety of valuing the franchise on a rate question, the authorities clearly settle the point in the affirmative. I refer to the master's report in the South & North Case, pp. 41–46, where he considers the question in an able manner, and I concur thoroughly in his conclusion. I merely cite here the authorities. Willcox *v.* Con. Gas Co., 212 U. S. 19–54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann.

Cas. 1034; Monongahela *v.* United States, 148 U. S. 321, 13 Sup. Ct. 622, 37 L. Ed. 463; People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Ann. St. Rep. 684; Topsham *v.* Maine W. Co., 99 Me. 371, 59 Atl. 537; State Railroad Tax Cases, 92 U. S. 606–607, 23 L. Ed. 663; Waterworks Co. *v.* Kansas City, 62 Fed. 863, 10 C. C. A. 653, 27 L. R. A. 827; Metropolitan T. Co. *v.* H. & T. Co., etc. (C. C.) 90 Fed. 683–689; Adams Express Company *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; Fargo *v.* Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; Adams Express Company *v.* Ohio, 166 U. S. 185–221, 17 Sup. Ct. 604, 41 L. Ed. 965; Beale and Wyman on R. R. Rate Regulation, §§ 368–370.[2]

FUHRMANN *v.* BUFFALO GENERAL ELECTRIC CO.

3 P. S. C., 2d D. of N. Y. 739. 1913.[1]

STEVENS, Chairman.

Value of Franchise

It is a fact that the respondent has a perpetual franchise covering all the streets and public ways of the city of Buffalo. This franchise was acquired in the purchase from the Brush company and the Thomson-Houston company of the fixed capital and franchises of those companies.

It is not quite clear what position the respondent takes concerning this franchise, as to whether it should be treated as an item of property having a value upon which the company is entitled to a return, or not. At page 39 of its brief it indicates three possible values, as follows:

Reproduction value new, with additions, etc.	$6,166,140
Commercial value	5,948,600
Net earnings value	5,750,000

In none of these valuations does a valuation appear for franchise, but upon pages 29–33 of its brief it argues that the franchise has value, and concludes as follows:

If it has a value, or if that value was validly agreed upon and capitalized under the laws in force when it was done, such value can not by statute be excluded from the total valuation upon which a public service corporation is entitled to a return.

[2] See Knoxville *v.* Knoxville W. Co. (1909), 212 U. S. 1; Minnesota Rate Cases (1913), 230 U. S. 352, 456 to 458; Buffalo Gas Co. *v.* City of Buffalo (1913), 3 P. S. C., 2d D. of N. Y. 553, 631 to 648.

[1] Only one point from the opinion is here reprinted.— ED.

In another place in the same brief the following language is used:

All three of the bases for the valuation of franchises in that case are present in this case, viz.:

(*a*) The franchises were included in the valuation in strict compliance with the then existing laws of the State.

(*b*) The agreement under which the franchises were included in the "aggregate value" of the properties, franchises, and rights consolidated has always been recognized as valid; otherwise it must be assumed that some attack upon it would have been made by some public authority during the twenty years during which it has continued.

(*c*) The stock has been dealt in for more than twenty years on the basis of its validity; and to declare the basis of it invalid after such a lapse of time would be to do great injury to innocent investors who have relied and had the right to rely upon the validity of an issue of stock made strictly in accordance with the law.

It must be assumed from the foregoing language that the respondent expects that some franchise value must be allowed it in fixing the rate. It recognizes that the stock and bonds which were issued to the Thomson-Houston and Brush companies amounted to $3,000,000; that the physical property had a value of practically $1,100,000, thus leaving $1,900,000 to be accounted for in intangibles of some character.

The respondent has made no proof whatsoever regarding this alleged franchise value, but if it claims any return thereon it relies wholly upon the argument presented in its brief.

It is true that a great deal has been said about franchise value in rate cases. It is unnecessary at this time to review what has been said. There is one paramount fundamental consideration which, in the judgment of the Commission, is conclusive upon the whole matter, and the facts upon which it is based are as follows:

It does not appear that any sum whatever was ever paid by the respondent or by its predecessor companies for this franchise. It was a gift by the City of Buffalo to the predecessor companies, and consists wholly in permission to use the streets of the city for the placing of poles, stringing of wires, and placing of conduits. The company was given this privilege, without which it could not transact its business. It is true that the franchise is of value to the company, and that without the franchise the remainder of its property would not possess any exchange value as an electric plant, or such as might be given it when coupled with the expectation that a franchise would be given. If it were entirely certain that no

franchise would be given, the property would have no exchange value except for purposes other than the distribution of electric energy. The franchise gives life to the enterprise and makes possible a return upon the capital which has been sunk in it. It makes possible a sale of the concern to other investors if those constructing it desire to part with their interest. It is indispensable to the conduct of the enterprise. All of these considerations, however, entirely fail to show that the public should pay a return upon some amount assumed to be the value of the franchise. The investors did not put the franchise into the enterprise. That was done by the public.

The whole truth lies in one sentence: If the franchise, which was a gift from the public to the company, should be made the basis of a money return, the practical result would be that the public would have to pay money to the company because it had given the company the right to occupy the public streets with its plant. This is the whole of the matter, and when thus stated, there is but little more to be said.

The City of Buffalo as a municipality has given the company a right to place its poles and string its wires in the streets for the purpose of lighting the streets. The argument that the franchise thus given has a value for rate making purposes comes just to this: that the City must annually pay to the company, in addition to all just amounts for operating expenses, taxes, amortization, and a proper return upon the investment made by the stockholders, a further sum because of the right which the City itself had given to occupy its streets. The company desires to make money by lighting the streets. It can not so do without having its plant in the streets. The City consents that the plant may be put in the streets, and the company then desires the City to pay it a large sum because it has consented to such use of the streets. If the franchise was of the value of $2,000,000, as seems to have been assumed in the consolidation, and the proper return upon this is 6 per cent. per annum, the public in the City of Buffalo would be required to pay $120,000 each year to the respondent for no reason whatsoever except that it had given the company the right to occupy the public streets with its plant. We are not prepared to say that either the municipality of Buffalo or the customers of the company residing in Buffalo should pay anything to the respondent on this account.[2]

[2] Compare Willcox *v.* Consolidated Gas Co. (1909), 212 U. S. 19.

PIONEER TELEPHONE AND TELEGRAPH CO. *v.* WESTENHAVER.

29 Okl. 429. 1911.[1]

HAYES, J. No inflexible method for the ascertainment of the value of the property used in the service has been fixed by legislative bodies dealing with rates, or by the courts in determining the validity of rates, and from the nature of the subject no inflexible method can be fixed. Sometimes the present value is arrived at by ascertaining the original cost of construction and all betterments, and deducting therefrom for depreciation; but this method does not always prove to be fair and just. If there was extravagance and unnecessary waste in the construction, or, as is often the case, fictitious stocks and bonds issued, the proceeds of which did not go into the original construction, such method would prove unfair to the public. On the other hand, where the market price of the physical units or of the labor entering into the construction of the plant has advanced since its construction, the original cost may be much lower than the present value, and for that reason be to the owner of the plant an unfair determination of its present value. The method most frequently used is to ascertain what it will cost to reproduce the plant, or the cost of its replacement at the present time, and deduct therefrom for depreciation in the existing plant. Both methods may be used and considered in ascertaining the present value, and both are often resorted to, as was done in this case.

By appellant's evidence, it is established that appellant has not owned the exchange plant at Enid from its construction, but that it acquired the plant, in 1905, from others, and paid therefor the sum of $54,000, which was the amount the plant had cost those who had constructed it. Appellant, immediately after purchasing the plant, began reconstructing it and enlarging its equipment. It expended for these purposes, during the year 1905, the sum of $17,115.78; during the year 1906, $52,177.47; during the year 1907, $12,395.76. None of said expenditures was made for land, building, rights of way, franchises, or other privileges. The total cost of the plant to appellant at the time of the first hearing in February, 1908, exclusive of lands and buildings, was $135,689.01. The Commission undertook to ascertain the present value by finding the reproductive value new, or cost of replacement. This method is practicable for a telephone exchange plant, and is probably as fair and accurate a method as could have been adopted in the present

[1] Part of the opinion is omitted.— ED.

case. In pursuance of this method, a Mr. Player, a telephone expert for the Commission, was sent with assistants to Enid to take inventory of the plant, and appraise its reproductive value or cost of replacement. The summary of his appraisement, corrected in accordance with admissions at the trial, is as follows:

1.	Interior equipment local exchange	$20,503.39
2.	Subscribers' stations	19,984.53
3.	Aërial construction	29,634.50
4.	Underground construction	11,371.22
5.	Replacement cost of the physical property after adding the cost of jumper wires and transmitters and receivers	81,493.64
6.	Engineering and supervision, 10 per cent.	8,149.37
7.	Total replacement cost of physical property on a contract basis	89,643.01
8.	Office fixtures and furniture	1,473.75
9.	Stock on hand — material	2,433.56
10.	Stock on hand — tools	153.37
11.	Rolling stock and live stock	960.00
		$94,663.69

The Commission adopted and found the foregoing appraisement to be the present value of the plant, and that the amount upon which appellant is entitled to receive a fair return is $94,663.69. Appellant accepts in this proceeding all the items in the foregoing appraisement as correct, but contends that there are certain elements entering into the reproductive value that the Commission has refused to allow. The items for which it contends, but which were refused by the Commission, are as follows:

1.	Miscellaneous	$ 2,050.28
2.	Piecemeal construction and working around plant..	6,000.00
3.	Interest during construction	4,000.00
4.	Working capital	8,740.06
		$20,790.34 [2]

[2] The court was satisfied from the evidence that the contract prices in the table of reproductive value included all miscellaneous expenses and so disallowed the first item contended for by the company.— ED.

The evidence upon which the appellant insists item No. 2, refused by the Commission, should have been allowed is substantially as follows, quoting from one of witnesses:

"The necessity of concentrating the large number of wires required of the larger city of Enid makes it advisable to adopt a different distribution or arrangement of pole lines. This involved the moving of some of the old poles in the lines, in order to shorten up spans to get sufficient strength for carrying the larger cables. The moving of the poles is an expensive undertaking, as same must be moved without crossing up or interfering with the wires then being used in the old plant. In a great many instances, new leads crossed old leads in such a way that extra work had to be done to prevent the new work from interfering with the operation of the old plant. The subscribers' instruments had to be rewired and adapted to work temporarily on the new plant until final changes should be made. In fact, there was no part of the new work that did not have to be worked out with some special regard to the protection of the old plant, in order that service might be continued."

We think, however, that the Commission committed no error in refusing to allow this item. The fact that appellant's plant has been constructed piecemeal does not increase its present value, although the cost of construction by such method may have been greater than if it had been constructed at one time. The plant, in our opinion, in arriving at its cost of reproduction new, should not be considered as an existing obstruction upon the streets, which would have to be worked around in constructing a new plant of a similar kind. The fact that other obstructions, such as telegraph systems or other telephone plants, exist in the streets at the present time, and would have to be worked around at this time in building a plant like appellant's, might require an allowance in arriving at the cost of reproduction new of appellant's plant; but a determination of that question is not required here, for it is not for such obstruction that this item is claimed.[3]

Item No. 3 disallowed by the Commission, is for interest on the capital invested during the period of construction. There is no controversy about the amount of this claim. The Commission refused to allow it, because it did not consider it a proper element of reproductive value. Counsel for the Commission, however, at the oral argument before this court, conceded, and we think properly, that there was no ground for refusing its allowance. It is a matter within the observation and knowledge of all that a plant, the cost

[3] Compare State Journal Printing Co. v. Madison G. & El. Co. (1910), 4 Wis. R. C. R. 501, 546; City of Ripon v. Ripon L. & W. Co. (1910), 5 Wis. R. C. R. 1, 15.

of whose physical units put together into a completed plant approximates $100,000, cannot be constructed instantly. It requires time to assemble the physical properties, and still a greater length of time to put those units into place, where they may be used to render service. During this period, the capital invested must of necessity be idle, and no income can be derived therefrom. When the construction of the plant is completed, no willing seller, who is not forced to sell, would take for his plant the cost of the physical units and the cost of the labor in the construction, because the plant has cost him in addition thereto the use of the capital, or a certain part thereof, invested in the physical properties during the time of construction. A willing buyer could afford to pay, and would pay, more than the actual cost of labor and material, assuming that the plant has been economically constructed, because such cost would not represent the total expenditures the purchaser would have to make, in order to construct the plant himself. In addition to such expenditures, he would have to expend the earnings of his capital during the period of construction. No case has been cited, and in our investigation we have found no case, involving this question, where a reasonable amount has not been considered and allowed for loss of interest during construction as part of the cost of construction.[4]

In addition to the foregoing items disallowed by the Commission, and the items allowed as constituting the fixed capital of the company, appellant contends for an allowance of item No. 4, as working capital, on which, also, it is entitled to receive a fair return. The Commission allowed the sum of $2,433.56 for stock on hand at Enid. Item No. 9 of Mr. Player's appraisal shows that sum to be the amount of stock and supplies on hand at Enid at the time he appraised the plant. Appellant maintains a general office at Oklahoma City, where are kept tools and teams, stock on hand in the general storehouse, a repair shop, cash to meet the current expenses of its plants and system throughout the state, and general office fixtures that are used by the general officers of

[4] "Included in plaintiff's estimate of value are: Interest on capital during construction, $22,415; promotion and organization, $14,943.69; and engineering, $18,679.61. These are mere estimates of what might be expended for these purposes in the construction of a new plant. Of course, all the money required would not necessarily remain idle during construction, and the witness admitted that the only expense for promotion and organization he could think of would be attorneys' fees in preparing proper papers. The expense for engineering was said to be the percentage taken into consideration by those contemplating such enterprises. Manifestly these estimates are largely speculative. Nothing can be allowed for the promotion and organization of the company, for it is immaterial by whom the plant may be owned in estimating its value." Cedar Rapids G. L. Co. *v.* Cedar Rapids (1909), 144 Ia. 426, 438. Compare City of Ripon *v.* Ripon L. & W. Co. (1910), 5 Wis. R. C. R. 1, 13; Shepard *v.* N. Pac. Ry. Co. (1911), 184 Fed. 765, 809.

the company, whose time is devoted to the entire properties of the company. Discussing the question of working capital, the Railroad Commission of Wisconsin, in Cunningham *v.* Chippewa Falls Water & Light Co., 5 W. R. C. R., 302, said:

"Plants of this kind, the same as practically all other business enterprises must have on hand a reasonable cash balance and other current resources, in order to operate economically and effectively. That this is the case is most self-evident. It has been pointed out in other decisions of this Commission, in Hill *v.* Antigo Water Co., 3 W. R. C. R. 623, 631, and particularly in State Journal *et al. v.* Madison Gas & Electric Co., 4 W. R. C. R. 501, 550. Just what sum represents a fair amount for working capital is nearly always a matter of judgment, and to this there is no exception in this case." [5]

The commission committed error in refusing to allow anything on items Nos. 3 and 4, disallowed, and should have allowed $4,000 on item No. 3, and $7,249.24 on item No. 4, or a total of $11,249.24. While the Commission, in disallowing these items in arriving at the present value of appellant's plant, committed error prejudicial to appellant, such error, we think, is offset by an omission of the Commission which operates against appellees and the public.

In finding the present value of the physical properties of the plant, the Commission treats the reproductive value of such properties new as the present value. But the physical properties of this plant are not new. Some parts of the same have been used for several years. It is true that a large portion of the same had been used only for periods of one and two years at the time of the hearing, but, as established by appellant's evidence, which we shall consider later, every year there is a depreciation in the physical properties of the plant that is not, and cannot be, taken care of by current repair, and, although some of the physical units have been used only for a brief time, such use brings about a depreciation; and the reproductive value new of such physical units represents the present value only when there is deducted therefrom the amount of annual depreciation. Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

All the evidence is to the effect that there is an annual depreciation of the properties of a telephone plant of the character of appellant's plant at Enid in the approximate amount of 7 per cent. per year over what can be taken care of by current repairs. Seven per cent. of the construction value of this plant for the years 1906, 1907, and 1908 makes a total depreciation in the sum of $15,410.46.

[5] See Consolidated G. Co. *v.* City of N. Y. (1907), 157 Fed. 849, 859; Mayhew *v.* Kings County L. Co. (1911), 2 P. S. C., 1st D. of N. Y. 659, 688.

During the year 1908, $1,340.60 was expended in replacing those parts of the plant so depreciated that they could no longer be made serviceable by repair. This amount should be deducted from the total depreciation, which would leave a net depreciation of $14,-069.86. This amount of depreciation for those three years, based on the estimate of 7 per cent. annual depreciation which the Commission failed to consider in determining the reproductive and present value of the plant, exceeds the amount of said items Nos. 3 and 4, which it refused to allow in finding such value. Owing to the fact that this plant is in large part new, the depreciation for the said three years would probably not reach the annual average. There is no evidence, however, as to what the ratio of depreciation of these three years would be to the average; but, since approximately one-third in value of the physical properties of the plant consists of old property existing in the plant at the time of purchase by appellant, there would be considerable depreciation during each of said years; and, from all the facts in the case, we think it cannot be said that the amount erroneously disallowed by the Commission is greater than the element of depreciation which the Commission failed to consider. It does not clearly appear that the finding of the Commission that $94,663.69, exclusive of going concern value, is the present value of the plant upon which appellant is entitled to receive a fair return is so erroneous that it should be disturbed, and, exclusive of the element of going concern value, we adopt said sum as the total value of appellant's property on which it is entitled to a fair return.

There is no contention that any value on account of unexpired franchise or for good will should be added to the reproductive value, in order to ascertain the present value; but it is contended that, by reason of the fact that appellant's plant has an established system of operation, has at present customers sufficient in number to pay the operating expenses and annual depreciation and some profit, it has a value beyond the mere cost of reproducing the plant. This element of value contended for has been generally referred to by the authorities as "the going concern value" or "going value." No case from the Supreme Court of the United States involving the reasonableness of rates or charges, wherein this question has been considered by that court, has been called to our attention. In Knoxville *v.* Knoxville Water Co., *supra,* the lower court added to the appraisement of the physical properties the sum of $6,000,000 for going concern value. The Supreme Court assumed, without deciding, that this item was properly added. There are many cases wherein the fair market value of public service property was involved, under franchises reserving to the municipality

the right to purchase the plant at or after a stipulated time for the fair market value thereof. These cases, so far as we have been able to examine them, uniformly hold that, in the absence of a provision in the franchise to the contrary, the going concern element of value must be considered in ascertaining the fair value of the plant.

One of the leading cases so holding is the National Water Works Co. *v.* Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827. In that case it was said in the opinion by Mr. Justice Brewer:

"Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets — in other words, the cost of reproduction — does not give the value of the property as it is to-day. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city, not only with a capacity to earn, but actually earning, makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. . . . The city, by this purchase, steps into possession of a waterworks plant, not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets, and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor, not merely the value of a system which might be made to earn, but that of a system which does earn."

Other similar cases supporting this doctrine, some of which cite the foregoing cases, are: City of Omaha *v.* Omaha Water Co., 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991; Spring Valley Water Works *v.* City of San Francisco (C. C.) 124 Fed. 574; Gloucester Water Supply Co. *v.* City of Gloucester, 179 Mass. 365, 60 N. E. 977; Kennebec Water Dist. *v.* City of Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Newburyport Water Co. *v.* City of Newburyport, 168 Mass. 541, 47 N. E. 533; Brunswick & T. Water Dist. *v.* Maine Water Co., 99 Me. 371, 59 Atl. 537.

For the purpose of taxation, it is well established that this element of value must be included in assessing the property. Galves-

ton, Harrisburg & San Antonio Ry. Co. *v.* State of Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; State *ex rel.* Foster *v.* Williams, 123 Wis. 73, 100 N. W. 1052; Chicago & N. W. R. *v.* State, 128 Wis. 553, 108 N. W. 557.

Whether, however, all matters which are considered in the foregoing two classes of cases as part of the going value, for the purposes involved in those cases, should be considered in determining the value as a basis for rate making is not necessary to determine in this case. It is apparent, however, that a complete telephone plant, without a single subscriber, or with but few subscribers, is less valuable, both to the owner of the plant and to the members of the public it serves, than the same plant with a larger patronage. The more people a subscriber can communicate with over a telephone exchange, the more service, as a general rule, is such exchange to him; and it is only when such exchange has subscribers that the property of the owner invested therein has an earning power. But subscribers are not obtained without expenditure of money, labor, and time, during which the capital invested in the plant earns nothing, and often fails to pay operating expenses. The customers must be connected with the system of the plant; trained employés must be obtained; and a system of operation must be established. Few industries, if any, involving an investment of $90,000 or more, can be made self-sustaining from the first day of their operation. The uncontradicted evidence in this case discloses that appellant's plant, for the years preceding the first hearing, failed to produce revenue sufficient for operating expenses, current repair, and lay aside an amount for depreciation. During the time of development, there is a loss of money actually expended and of dividends upon the property invested. How shall this be taken care of? Must it be borne by the owner of the plant? Or by the initial customers? Or shall it be treated as part of the investment or value of the plant, constituting the basis upon which charges shall be made to all customers who receive the benefits from the increased service-rendering power of the plant by reason of these expenditures? It seems that the last solution is the logical, just, and correct one. If rates were to be charged from the beginning, so as to cover these expenditures, and earn a dividend from the time a plant is first operated, the rate to the first customers would be in many instances, if not in all, so exorbitant as to be prohibitive, and would be so at the time when the plant could be of least service to them. On the other hand, the public cannot expect as a business proposition, or demand as a legal right, that this loss shall be borne by him who furnishes the service; for investors in public service property make such investments for the return they will yield; and, if the law

required that a portion of the investments shall never yield any return, but shall be a total loss to the investor, capital would unwillingly be placed into such class of investments; but the law, in our opinion, does not so require. Private property can no more be taken in this method for public use without compensation, than by any other method. When the use of the property and the expenditures made during the nonexpense-paying and nondividend-paying period of the plant are treated as an element of the value of the property upon which fair returns shall be allowed, then the burden is distributed among those who receive the benefits of the expenditures and the use of the property in its enhanced value.

Discussing this question, the Railroad Commission of Wisconsin, in Geo. W. Hill *et al. v.* Antigo Water Co., decided August 3, 1909, said:

"With respect to the value of the plant, it was found that for the purposes of this case, and under the conditions that prevail, the investors in the plant and those who carry on its business are equitably entitled to reasonable returns for interest and profits on a valuation that fairly represents the legitimate and necessary costs of constructing the plant and of building up its business. The valuation which is thus made the basis for the earning of the rates should also be a valuation that is subject to the fewest fluctuations. Such a valuation as this appears to be equitable to the investors and those who carry on the business, on the one hand, and to the customers of the plant, on the other, It also furnishes a basis upon which rates may be fixed that are reasonable and just to all concerned, and that also have such stability as is required by the best interests of those affected."

Although that body is not one of last resort for the determination of questions involving the reasonableness of rate, the reasoning with which it supports the doctrine above quoted commends its conclusions to us as being sound. All the evidence of appellant is that the going-concern value of the plant in this case is equivalent to 20 per cent. of the reproductive value. This evidence is not contradicted by the state. The position of counsel for the state and of the Commission being that, whatever its amount is, it is not an element of present value forming a basis for the earning of rates. Twenty per cent. of the reproductive value is $18,932.73, which, added to the reproductive value of the physical properties found by the Commission, makes a total present value, on which appellant is entitled to receive a fair return, in the sum of $113,596.42.

HILL *v.* ANTIGO WATER CO.

3 Wis. R. C. R. 623. 1909.[1]

Cost of Building Up the Business.

The facts thus far presented show the cost to the owner of the original construction of the plant, including all extensions; the gross and net earnings of the plant for the entire period; the cost of reproducing the plant new, and the present value of the plant. The cost of construction, and the present value of the plant relate to its physical property only. They show the cost to the owner of obtaining a plant up to the point where it was ready for business or for operation. They also show what it would cost to build a like plant today under the prices which prevailed during a few of the years which immediately preceded 1908. They further show its present value or the balance left when the cost of reproduction new is reduced by the amount of the depreciation that has occurred.

The facts thus enumerated are among the more important elements that should be taken into consideration in determining the value of a plant. But while important, they are not the only ones that should be considered in this connection. There are other facts, such as the cost of building up the business of a plant, that are almost, if not equally, as important. This cost bears about the same relation to the business of a plant as that which the cost of construction bears to its physical structure. Besides this, appraisers and engineers, when called upon to value such plants, are often considering the earning value of the business or the number of customers the plants have acquired, as well as the franchises under which they are operating, and these elements are also often taken into account by courts in passing upon such appraisals.

A water works plant can, perhaps, be called a going concern. But it cannot be called a going business or a paying concern until it has acquired a sufficient amount of business so that the revenues obtained from the water it furnishes are large enough to meet operating expenses, including a reasonable amount for interest and profit on the investment.

A mere physical plant, no matter how perfect or how well it is adapted to the purpose for which it is intended, amounts to but little unless it has or can obtain a paying business. Without business it is a dead mass instead of a living concern earning profits. To have profits it must have business or customers

[1] Only an extract from the opinion is here reprinted.— Ed.

who avail themselves of the services it renders at rates that yield an adequate income.

But new plants are seldom paying at the start. Several years are usually required before they obtain a sufficient amount of business or earnings to cover operating expenses, including depreciation and a reasonable rate of interest upon the investment. The amount by which the earnings fail to meet these requirements may thus be regarded as deficits from the operation. These deficits constitute the cost of building up the business of the plant. They are as much a part of the cost of building up the business as loss of interest during the construction of the plant is a part of the cost of its construction. They are taken into account by those who enter upon such undertakings, and if they cannot be recovered in some way, the plant fails by that much to yield reasonable returns upon the sum that has been expended upon it and its business.

Such costs or deficits are, generally speaking, unavoidable. Few, if any, plants are paying from the start. The only way in which many, if not most of them, can be made paying concerns at the start is apparently by having the city or tax payers foot the deficit. Private customers cannot always be made to foot them, for the rates required to yield reasonable returns at the start or while the business is light, are more than likely to be so high that rather than pay them the consumers would forego the service. Both of these methods of making up the deficits, therefore, would seem to be impracticable. It would seem to follow from this, that early losses will have to be met by the investors. This is as true for plants owned and operated by the municipality as for plants owned and operated by private investors. There is apparently no way in which this can be prevented.

But while such losses will have to be met by the investors, it is not expected that these sacrifices will be anything but temporary. The investors fully expect, and in most cases rightly so, that these losses will be made good as soon as warranted by the business of the plant. They usually regard such deficits as an additional investment upon which, unless the whole amount is refunded to them in some form, they are entitled to the same returns as on the rest of their capital. Unless they are so compensated, it is manifestly clear that no money from private sources is likely ever to be invested for such purposes, except, perhaps, in a few rare instances for philanthropic reasons. If there is not a reasonable assurance of reasonable returns upon the cost of the plant, as well as upon the cost of the business of the said plant, it is manifestly clear that private investors will seek other fields. It is upon this

basis only that such plants will be built at all, at least by private capital. Communities that are not willing to bear this expense are also likely to have to do without such conveniences as water under pressure, except in cases where the functions of the investors are assumed by the tax payers through the construction of municipal plants. Even in the case of municipal plants it is necessary that the costs in question should be covered if permanent losses to the tax payers are to be avoided.

The total investment consists of the cost of the plant, of its business, and of its franchise. The cost of operation consists of the expenses of running the plant, including depreciation and a reasonable return upon the investment. The amount represented by the investment is furnished by the investors; the operating expenses are borne by the consumers. If the earnings are not sufficient to cover these expenses, the service will, in the long run, not be furnished. In other words, in this case, as in life generally, the price must be paid if the service is to be had. As services of this kind are usually worth more than they cost, it is, as a rule, in line with the best policy that they should be provided and that the cost of the same should be paid in full.

It thus appears that the cost of building up the business of a plant is in most cases as unavoidable as the cost of the construction of the plant itself; that when such costs are incurred, they must be reimbursed in some form by the consumers in order that capital may be secured; that such reimbursement is equitable as between investors and consumers; and that this is a just method of dealing with such costs for other reasons. If this is sound, it also follows that the cost of the business must also be taken into consideration in determining the value of the plants for rate-fixing purposes.

This would seem to apply with special force where by law the rates are limited so as not to yield more than reasonable returns upon the investment. While such legislation may not be a guarantee against losses of any kind, it is clear that if the rates fixed under these laws should not include anything for the cost of building up the business, there would be no way in which these costs could be made good to the investors. In that event these costs would become a permanent loss to them; and the consumers, in turn, would be relieved from paying a reasonable return on a part of the investment or on the capital that is devoted to furnishing them with the service in question. This is a situation of which the investors are taking due notice, and which is entitled to due consideration. If not taken into account, it will tend to keep new capital from entering this field as well as to prevent exact justice

to capital which has already entered the same. The former would result in hardships or inconveniences to the consumers; the latter would apparently be unjust to at least many of the present investors in such utilities.[2]

LONG BRANCH COMMISSION *v.* TINTERN MANOR WATER CO.

70 N. J. Eq. 71. 1905.[1]

PITNEY, V. C. This brings us to the cost of the new plant in producing proof of which a large amount of time and space were occupied. They were commenced by a contracting company under specifications of the work given in detail and were to be paid for in $1,200,000 in first mortgage bonds and divers shares of the capital stock of the par value of $100,000.

Difficulties were encountered in carrying out this contract according to its terms, and the plans were changed. The result of this was that the contractors were not held to their bargain, but were paid in bonds and stock according to the actual amount of their expenditures.

In order to ascertain those expenditures an inventory of the work done was taken, and the cost was ascertained by the vouchers and checks furnished by the contractors.

The defendant estimates the cost including the Takanassee and Deal works at $1,500,000 and upwards, without counting the shares of stock which were issued and which may be here treated as a mere bonus.

Several distinct criticisms and objections are made to the details given of this valuation. First, it is said that the cost of the site for the reservoir, amounting to $76,000, is too great. The land itself, consisting of several hundred acres, cost $40,000 and the cost of clearing, $35,000.

In fact, only about one-third or one-half of this land has been so far covered with water, and much more than the amount covered has been cleared.

The fact is that the original plan provided for a very large reservoir, including a very high dam, but in carrying it out a lower dam and smaller reservoir were adopted.

[2] See City of Appleton *v.* Appleton W. W. Co. (1910), 5 Wis. R. C. R. 215, 276; *Re* Application of Oconto City W. S. Co. (1911), 7 Wis. R. C. R. 497, 515.
Compare Spring Valley W. Co. *v.* San Francisco (1908), 165 Fed. 667, 696.

[1] Part of the opinion is omitted.— ED.

It is admitted that the present supply is ample for many years to come. I shall deduct from the total $25,000 on this account.

The next item criticised is the cost of the dam itself, the total cost of which was $89,500.

The objection to this is that it was laid out and erected to its present height of a width sufficient for a dam two or three times as high, and that such construction cost nearly or quite twice as much as it would have done for a dam of its present height. I think this objection is well taken, but not to the extent claimed by complainants. I shall deduct $30,000 on account of the excessive cost of the dam.

The next objection is to the size of the principal main laid, viz., about 42,000 feet of 36-inch main, which was much too large and expensive, and that complainant ought not to be charged with an income on so great an outlay. Defendant admits that its plans were adapted to a future estimated growth of 50 years.

Mr. Sherrerd says, and I agree with him, that 50 years is too long for a forecast. He fixed 30 years as the usual limit. Now it is readily perceived that the difference in cost between a 36-inch main and a 24 or 30-inch main is, or may be, so great that if it be saved and invested it will with the accrued interest in a period of 30 years reach a sum sufficient to lay an additional main if the first shall at that time prove to be insufficient.

I conclude, then, that a thirty-inch main from the dam to the pumping station (nearly two miles), and from thence to the town (over six miles), is ample, flanked, as it is, by an eighteen-inch main from Little Silver to Seabright, each of these aiding the other in the case of an emergency of fire.

Besides, I am entirely satisfied that the estimate for seventy-five gallons per head per day would be reduced below fifty gallons per day by the general introduction of meters, and such reduction of consumption, or rather of waste, will result in the saving of fuel for making steam. This, I think, it is the clear duty of the defendant to accomplish as soon as practicable.

By the use of the same hydraulic tables showing the relative weight of thirty and thirty-six inch mains and the difference in weight in lead used in joining the same, I conclude that the reduction of cost of the thirty-six inch main laid, if a thirty-inch main had been used, would have been one-quarter.

The total cost of the eight miles of the thirty-six inch main, with the appliances, was $300,000. One-fourth of that would be $75,000, which I shall allow on that account.

The next objection is to the amount paid ($425,000) for the old works. No reliable statement was made as to what those works

originally cost the old company. All that was said was that the present proprietors would not sell them for less than $325,000, besides the bonded debt. But, then, we must consider that there was not an actual sale for cash, but a merging into a new corporation. On the other hand, there was some actual loss in the abandonment of the old plant and the amount spent in and about the dam and pumping station at Takanassee. I estimate it at $100,000. I deduct, then, from the $1,500,000, as follows: Whole cost of works $1,500,000; loss on Takanassee, $100,000; overcost of thirty-six inch main, $75,000; overcost of dam, $30,000; overcost on reservoir, $25,000; total loss, $230,000, leaving $1,270,000 as the amount upon which defendant ought to receive dividends.[2]

THE MINNESOTA RATE CASES.

230 U. S. 352. 1913.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it cannot be sustained. It is said that the company would be compelled to pay more than what is the normal market values of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similiarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights, and it cannot be supposed that they would be disregarded.

It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the rail-

[2] Compare Mayhew *v.* Kings County L. Co. (1911), 2 P. S. C., 1st D. of N. Y. 659, 683; San Diego L. & T. Co. *v.* Jasper (1903), 189 U. S. 439, 446.

[1] Only an extract from the opinion is here reprinted.— ED.

road to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. United States *v.* Chandler-Dunbar Water Power Co. decided May 26, 1913, 229 U. S. 503. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403; Shoemaker *v.* United States, 147 U. S. 282; United States *v.* Chandler-Dunbar Water Power Co. *supra.* But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. Boston Chamber of Commerce *v.* Boston, 217 U. S. 189, 195. The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others, so as to make it a part of a continuous railroad right of way held in one ownership. United States *v.* Chandler-Dunbar Water Power Co., *supra* and Boston Chamber of Commerce *v.* Boston, *supra.* There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way if the railroad were not there is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and cannot be entertained. The conditions of ownership of the property and the amounts which would have to be paid in aquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the

judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts.

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers — men of ability and experience — were manifestly seeking to give their best judgments as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist, and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property *sui generis*, "a large body of land in a continuous ownership," representing one of the "highest uses" of property, and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment.

If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation, and while, under the guise of such regulation, it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which, in the last analysis, must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market

value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays.[2]

In re RATES OF QUEENS BOROUGH GAS AND ELECTRIC CO.

2 P. S. C., 1st D. of N. Y. 544. 1911.[1]

MALTBIE, Commissioner. Thus land has been taken at its fair value, and not at its original cost, and the annual appreciation of land has been treated as a profit. By this method, all property is treated absolutely alike, as Judge Hough suggests. No difference is made, except as depreciation represents a decrease in assets, it is placed as a *debit* against operation, while appreciation is placed as *credit* because it is an increase in assets. Land has sometimes been treated like other property only to a degree; that is, each class has been appraised at its present worth or value. That has been done in this case. But if property is to be taken at its *depreciated* value where it has depreciated, an entry must regularly be made in estimating operating expenses equal to the average annual depreciation. Conversely, if land, or any other property which genuinely appreciates in value, is to be taken at its *appreciated* value, then an entry must be made in the estimated receipts equal to the annual appreciation. Unless this is done, it is obvious that the consumer will be burdened with all the estimated decreases in assets but not credited with the increases in assets. If the principle laid down by the courts is to be followed in part, it should be followed in whole.

It is suggested that the annual increase in the value of land which is treated as income is not actually received. Increase in the value of unoccupied land is not realized until sold or put into use, but it is real, nevertheless, although payment may be deferred. Likewise, payments to the depreciation fund are not actually expended; yet they have been considered legitimate charges in practically every case. Furthermore, the *annual* increment is no more in-

[2] "In the fourth place, contributions by the city should be deducted. The city of New York has paid to the Brooklyn Union Elevated Railroad Company approximately $800,000 [the amount contributed by the city towards the cost of bridges, crossings, etc.]. No company ought to be allowed to capitalize such contributions, or charge a rate which will yield a fair return upon these contributions. With equal propriety the companies could claim the right to earn profits upon the capitalized value of the streets and of the Brooklyn and Williamsburg bridges, which they have been allowed to use practically without charge. The capitalization of franchises, a procedure prohibited by the law, would be more plausible." Dissenting opinion of MALTBIE, Commissioner, in *In re* MacReynolds *v.* Brooklyn Un. R. R. Co. (1910), 2 P. S. C., 1st D. of N. Y. 246, 265.

[1] Only an extract from the opinion is here reprinted.— ED.

definite than the *total* increment — the present value. But if the present value can be determined, it is possible to determine past *annual* appreciation with positive accuracy, for it is only a simple mathematical calculation. It is also probably as easy to estimate increases in the near future as it is to estimate what obsolescence, which is a form of depreciation, there will be in the future.

Indeed, the problem of handling appreciation is much simpler than depreciation. If the property is growing more valuable, the investor need not worry; and if the state recognizes his right to earn a fair return upon the increase, he is fully protected. It is not necessary that the increase be represented by stocks and bonds, for, if the earning power is there, he will receive a return thereon, regardless of the amount of securities. In fact, the existence of an increase which is not represented by securities is an element of safety, a reserve fund of a valuable kind.

There is a further similarity. The exact amount of depreciation and the annual rate are not definitely known until the piece of property is actually replaced or has become useless. The total appreciation and the average annual rate are not known until the land is sold, but when it has been disposed of (and plants are continually being removed and the land sold), they become absolute certainties. Why should these matters be considered less definite when applied to land than when applied to the buildings thereon? The depreciation of the building is a charge against operation; why should not appreciation of land be a credit?

The entries in the preceding tables representing the increase in land have been carefully computed. It has been possible to ascertain the approximate cost of the land and the date of purchase. Having these facts, one may easily compute the average annual rate of increase. The experts called by the company and the Commission were also examined upon the present trend of prices. The estimated increases used in the above computations are believed to be conservative.

BRYMER *v.* BUTLER WATER CO.

179 Pa. St. 231. 1897.[1]

MR. JUSTICE WILLIAMS. In determining the amount of the investment by the stockholders, it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is

[1] Only an extract from the opinion is here reprinted.— ED.

not necessary that the money should first be paid to the stockholder, and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO. *v.* TOMPKINS.

176 U. S. 167. 1900.[1]

Mr. Justice Brewer delivered the opinion of the court.

It may be premised that the books of the plaintiff, showing its business for the four years, were examined, and so much as was deemed necessary admitted in evidence. From those books was disclosed with mathematical accuracy the gross receipts of the company on all its business in all the States during each of the four years and the actual cost of doing that business during each of those years; also the gross receipts from the business done in South Dakota, and separately the amount which was received in that State from interstate business and that from local. If the schedule of rates prescribed by the defendants had been in force during the four years, and the same amount of business had been done by the company, the reduction in gross receipts from the passenger business would have been fifteen per cent, and from the freight business seventeen per cent. Of course, the cost of doing the business would be substantially the same. The court found the value of the plaintiff's property in South Dakota to be $10,000,000, although, according to the testimony, it was bonded for over $19,000,000. It held that it was not fair to consider that sum, $10,000,000, the value of the property employed in doing local business, for it was also used in doing interstate business; and that the true way to determine the value of the property which could be regarded as employed in local business was by dividing the total value of $10,000,000 in the same proportion that existed between the amount of gross receipts from interstate business and that from local business, each of which amounts was, as we have seen, accurately shown by the testimony. Upon that basis of division it found that the value of the company's property employed in local business was

[1] Only an extract from the opinion is here reprinted.— Ed.

for the first year, $2,200,000; the second year, $2,600,000; the third year, $2,100,000; and the last year, $1,900,000, and also that the gross receipts from local business were for the first year, 18.5 per cent of the valuation; for the second year, 12.7 per cent; for the third year, 15.6 per cent, and for the last year, 16.3 per cent. In other words, for these several years the company received as compensation for doing its local business the per cent named of the real value of the property used in doing that business. Then, proceeding on the supposition that the defendant's schedule had been in force and the rates reduced as therein prescribed during these four years, it divided the valuation of $10,000,000 on the like proportion of the receipts from interstate business to the receipts from local business as thus diminished, and upon such division found that the valuation of the plaintiff's property engaged in local business would have been, for the first year, $1,900,000; for the second year, $2,300,000; for the third year, $1,800,000; and the last year, $1,600,000; and upon such basis that the gross receipts from local business would have amounted to 18 per cent of the value of the property for the first year, 12.1 for the second, 15.3 for the third, and 16.2 for the last. Upon this it held that the difference between the per cent of receipts in the two cases was slight, and that there was no change in what may rightfully be called the earning capacity of the property sufficient to justify a declaration that the reduced rates prescribed were unreasonable. In other words, it was of the opinion that the earning capacity was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

But that there was some fallacy in this reasoning would seem to be suggested by the fact that although the defendants' schedule would have reduced the actual receipts 15 per cent on the passenger and 17 per cent on the freight business, the earning capacity for the last year was diminished only one tenth of one per cent. Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving $500,000 the

company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business — six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced.[2]

Section 6.

What Rate of Return Should Be Allowed.

CEDAR RAPIDS WATER CO. *v.* CITY OF CEDAR RAPIDS.

118 Ia. 234. 1902.[1]

Weaver, J. We shall not attempt to go into any minute statement or analysis of the figures and computations relied upon by

[2] In Minnesota Rate Cases (1913), 230 U. S. 352, 461, after quoting from the last paragraph reprinted above, Mr. Justice Hughes said:

"The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the State's reduction would have to be tested by the very rates which the State denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the State's action itself reduces the amount of value upon which the fairness of the return is to be computed.

"When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business, that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the State rates, but this we cannot assume."

[1] Only an extract from the opinion is here reprinted.— Ed.

counsel. Some of the items by which plaintiff increases the alleged value of the works and reduces the showing of net earnings, as well as other items by which the defendant decreased the former and increased the latter, we think are unwarranted. The testimony, when taken as a whole, and considered in the light of all the proved and admitted circumstances, indicates the present fair value of the company's property to be somewhere from $400,000 to $500,000. The total earnings of the works, as charged upon plaintiff's books, for the year preceding the trial in the district court, were, in round numbers, $59,000, subject, however, to some discounts for advance payments. Of this income about one-third is charged to the city, and is not affected by the ordinance in controversy. The other two-thirds are collected from private consumers, and the charges for such service are reduced by the ordinance in varying proportions. Just the extent which this reduction will affect the company's earnings it is impossible to prove or predict with certainty, but we see no reason to believe that the total revenue, after making all due allowance for discounts, will be reduced below $50,000. The operating expenses charged for the year preceding the trial (being largely in excess of the average in its experience) were $23,000, or, including taxes, $28,000. On this basis the net earnings are 5½ per cent. on a valuation of $400,000, or 4⅘ per cent. on a valuation of $500,000, or 6½ per cent. on the total amount of capital stock and bonds. Stated otherwise, this will enable the company to pay its interest charge of $7,500, make a dividend of 5 per cent. on its capital stock (including stock issued as dividends), and leave a margin of over $3,000 for contingencies. This estimate of earnings may be very materially reduced, or the estimate of the value of the plant be very materially increased, before the court will be justified in saying that the plaintiff's property is being exposed to destruction or confiscation by an unprofitable schedule of rates.

We have pursued this subject far enough to demonstrate that, even taking the high estimate of value which plaintiff places upon its property, and its own showing of earnings, there is nothing in the ordinance sought to be nullified which calls for judicial interference. The net earnings upon this showing, if not large, are substantial. The court cannot undertake to guarantee the company any fixed or certain return upon its investment. The exercise of such a power would work an utter destruction of the legislative right to regulate rates of water companies and other corporations operating works of public utility. We think the decisions have already gone to the verge of safety in nullifying legislative acts of this character; and to go farther, and say that the courts will not

only preserve property from confiscation and destruction by legislative power, but will also assure to its owners a definite and fixed rate of profit upon their investment, would be an act of judicial usurpation.[2]

WILCOX *v.* CONSOLIDATED GAS CO.

212 U. S. 19. 1909.[1]

MR. JUSTICE PECKHAM delivered the opinion of the court.

There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which, in some cases, might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the de-

[2] See Chicago & N. W. Ry. Co. *v.* Dey (1888), 35 Fed. 866, 879.

[1] Only an extract from the opinion is here reprinted.— ED.

mand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded is as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of 6 per cent would be enough to avoid a charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.

Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to 6 per cent on the fair value of its property devoted to the public use.

DES MOINES WATER CO. *v.* CITY OF DES MOINES.

192 Fed. 193. 1911.[1]

SMITH MCPHERSON, District Judge. The waterworks company claims that certain other specific things, by name, should be allowed, either by way of enhancing the value of the property, or that which would be the same thing, by calling them hazards, and allowing such rates as would produce a reasonable revenue thereon. One of these is the fact that rates are subject, at any time, to change by the city council, subject to local prejudice, and without experience or training with reference thereto; the hazard that the city, at any time, can force an involuntary sale by proceedings of condemnation; the fact that the franchise cannot extend beyond 25 years, with no assurance that it will be renewed; another competing plant may be allowed; the city may establish a competing plant; and other minor hazards.

There can be no question but that some of these matters should be given consideration. The greater the hazard, the higher the rate of interest. A farmer who observes his contracts and pays his debts can get a loan at a low rate of interest by a mortgage on his farm. A man whose credit is not good, and who can only tender security of a doubtful character, must pay a high rate of interest. This has always been so, and always will remain so. The fact that the company's charter may be revoked by a forced sale, or that it may expire

[1] Part of the opinion is omitted.— ED.

at the end of 25 years, and that it will be continuously kept in litigation, are all hazards, which in other business enterprises would increase the rate of interest that the borrower must pay, and justly entitles it to a higher rate of earnings than if its earnings were certain and fixed, and were in perpetuity or of long duration. But it is well-nigh impossible to point out just what particular hazard, and to what extent such a particular hazard, will increase the rate of interest, or will entitle it to higher rate of earnings.

From the most exhaustive reading and consideration of the voluminous record in this case, a record of many thousands of pages, I not only cannot say that the findings of the master as to the value of this water plant have not been fairly stated by him, when he states that it is worth not less than $1,840,000, in round numbers, and perhaps, that it is worth something like $15,000 in excess of that; but I think that the master has been conservative in fixing this valuation. It can be well said that, if he is in error, it has been by an undervaluation.

Taking into account the expenses of approximately $122,000 per year, the reduction proposed by the new ordinance would make the plant unremunerative to the extent that it is entitled to receive, considering the fair value of money in a state like Iowa. And, considering the hazards and liabilities, some of them certain and others contingent, and some of them destructive, an 8 per cent. return is moderate. But this proposed ordinance would allow nothing like 8 per cent.

All fair-minded people should readily agree, and the defendant city and its officers ought to agree, that reasonable returns should be allowed to not only these investments, but these dangers and hazards, which clearly are to be taken into account, under the authorities. Some of the leading cases which support the foregoing are the following: City of Omaha *v.* Omaha Water Company, 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991; National Waterworks Company *v.* Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; Spring Valley Co. *v.* San Francisco (C. C.) 124 Fed. 574; Kennebec Water District *v.* City of Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Brunswick, etc., *v.* Maine Water Co., 99 Me. 371, 59 Atl. 537; Gloucester Water Co. *v.* City of Gloucester, 179 Mass. 365, 60 N. E. 977; Norwich Gas & Electric Co. *v.* City of Norwich, 76 Conn. 565, 57 Atl. 746; Galena Water Co. *v.* City of Galena, 74 Kan. 644, 87 Pac. 735; Newburyport Water Co. *v.* City of Newburyport, 168 Mass. 541, 47 N. E. 533; Town of Bristol *v.* Bristol Water Works, 23 R. I. 274, 49 Atl. 974; Wilcox *v.* Consolidated Gas Co. 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382. The foregoing authorities sustain the foregoing holdings.

The exceptions, both of the city and of the waterworks company, are all overruled. The report of the master is confirmed, and there will be a decree enjoining the enforcement of the ordinance in question.

COTTING *v.* KANSAS STOCK YARDS CO.

183 U. S. 79. 1901.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

In the light of these quotations,[2] this may be affirmed to be the present scope of the decisions of this court in respect to the power of the legislature in regulating rates: As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed.

As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which if enforced would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896 the income of the stock-yards company would have been reduced that year $300,651.77, leaving a net income of $289,916.96. This would have

[1] Only a part of the opinion is reprinted.— ED.

[2] From Munn *v.* Illinois, 94 U. S. 113, 125; Spring V. W. W. Co. *v.* Schottler, 110 U. S. 347, 354; Railroad Commission Cases, 116 U. S. 307, 331; Chicago M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418, 458; Chicago & G. T. Ry. *v.* Wellman, 143 U. S. 339, 344; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 399; St. Louis & S. F. Ry. Co. *v.* Gill, 156 U. S. 649, 657; Covington, etc., T. Co. *v.* Sandford, 164 U. S. 578, 596; Smyth *v.* Ames, 169 U. S. 466, 546; San Diego L. Co. *v.* National City, 174 U. S. 739, 757.— ED.

yielded a return of 5.3 per cent on the value of property used for stock-yard purposes, as fixed by the master. Or if the capital stock be taken after deducting therefrom such portion thereof which represents property not used for stock-yard purposes, the return would be 4.6 per cent.

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

Again, wherever a purely public use is contemplated, the State

may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the state. He is not using his property in the discharge of a purely public service. He acquires from the state none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business.

Pursuing this thought, we add that the state's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transac-

tion the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.[3]

[3] MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE GRAY, MR. JUSTICE BROWN, MR. JUSTICE SHIRAS, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA:

"We assent to the judgment of reversal — so far as the merits of the case are concerned — upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion."

CHAPTER V.

DISCRIMINATION.

THE SUE.

22 Fed. 843. 1885.[1]

MORRIS, C. J. This suit (with three others of like character by other female libelants) has been instituted to recover damages on the allegation that the libelant, who is a colored woman of unobjectionable character and conduct, and who had purchased a first-class ticket for a passage on the steam-boat *Sue,* in August, 1884, from Baltimore to a landing in Virginia, on the Potomac river, was refused proper first-class sleeping accommodations on board, and was in consequence compelled to sit up all night in the saloon, and experienced great discomforts. The answer of the claimants of the steam-boat alleges in defense that there was provided on board a sleeping cabin for white female passengers in the after part of the boat, and that a sleeping cabin equally good in every respect was provided forward, on the same deck, for female colored passengers, and that these libelants were told and well knew before they came on board that the regulations of the boat did not allow either class to intrude into the cabin of the other; that the libelants all refused to sleep in cabin provided for the colored female passengers, and preferred to remain sitting in the saloon all night rather than to go into it, claiming as matter of right to be allowed to go into the white women's cabin.

There are two issues raised: The first one of law, the libelants denying the legal right of the owners of the steam-boat to separate passengers for any purpose, because of race or color. The second is an issue of fact, the libelants denying that the forward cabin assigned to them was, in fact, equal in comfort and convenience to the after cabin assigned to white women.

In determining the question of law, it is to be observed that the steamer *Sue* is employed on public navigable waters, and plies between the port of Baltimore and ports in the state of Virginia, and that the regulations made by her owners and enforced on board of her, by which colored passengers are assigned to a different sleeping

[1] Part of the opinion is omitted.— ED.

cabin from white passengers, is a matter affecting interstate commerce. It is, therefore, a matter which cannot be regulated by state law, and congress having refrained from legislation on the subject, the owners of the boat are left at liberty to adopt in reference thereto such reasonable regulations as the common law allows. Hall *v.* De Cuir, 95 U. S. 490. One of the restrictions which the common law imposes is that such regulations must be reasonable, and tend to the comfort and safety of the passengers generally, and that accommodations equal in comfort and safety must be afforded to all alike who pay the same price. The law of carriers of passengers in this respect is well stated in Hutch. Carr. § 542. He states the result of the decisions to be that, if the conveyance employed be adapted to the carriage of passengers separated into different classes according to the fare which may be charged, the character of the accommodations afforded, or of the persons to be carried, the carrier may so divide them, and any regulation confining those of one class to one part of the conveyance will not be regarded as unreasonable if made in good faith for the better accommodation and convenience of the passengers.

The precise question raised in this case, viz., whether a separation of passengers as to their sleeping cabins on board a steamboat, made solely on the ground of race or color, shall be held to be a reasonable regulation, has not to my knowledge been decided in any court. There have been cases arising from separations made in respect to day travel as to which there has been some conflict of views, and one or two cases have been cited in which such separations have been held unreasonable. U. S. *v.* Buntin, 10 Fed. Rep. 739, note; Gray *v.* Cincinnati S. R. Co. 11 Fed. Rep. 683, note. These differences of opinion, I think, may be explained, in part at least, by differences in the circumstances existing in different communities. It is, in my judgment, a mixed question of law and fact, and whenever it appears that facts do not exist which give reason for the separation, the reasonableness of the regulation cannot be sustained. But the great weight of authority, it seems to me, supports the doctrine that, to some extent at least, and under some circumsances, such a separation is allowable at common law.

But to say that regulations based on differences of race or color may be lawful is not to say that every such regulation can be upheld. The regulation must not only be reasonable in that it conduces to the general comfort of passengers, but it must not deny equal conveniences and opportunities to all who pay the same fare. This discrimination on account of race or color is one which it must be conceded goes to the very limit of the right of a carrier

to regulate the privileges of his passengers, and it can only be exercised when the carrier has it in his power to provide for the passenger, who is excluded from a place to which another person, paying the same fare, is admitted, accommodations equally safe, convenient, and pleasant.

This proposition of law, I am informed, was applied by my learned predecessor, Judge GILES, in a suit brought by a colored man who had been excluded from a street car. The street car company had arranged that every third or fourth car, and none other, should be exclusively for colored people, but Judge GILES held that this did not afford equal convenience to this class of citizens. And this leads to the important question of fact in the present case. The libelants testify that the forward cabin, which was assigned to their use, was offensively dirty; that the mattresses in the berths were defaced; that sheets were wanting or soiled, and that there were hardly any berths which had pillows; that there were no blankets and no conveniences for washing. They testify that from their own knowledge the white women's cabin was clean, pleasant, and inviting, and had none of these defects. They declare that on former trips they had found the forward cabin so intolerable that they sat up all night, and, finding it in the same condition this trip, they refused to remain in it, and being refused admission into the after cabin, again sat up all night. In these assertions they are supported by five other persons, all colored persons, to be sure, but respectable, and all having had similar opportunities of experience. They claim also that the approach to the stairway to the cabin assigned for their use was obstructed by cattle, and that there was no key with which their door could be secured, and that its location did not compare in comfort with the women's cabin aft. While allowing a good deal for the inflamed feelings of these libelants and witnesses, who all testify under feelings of resentment, I still am far from thinking that they have, in a reckless spirit of vindictiveness, made up this story from the whole cloth.

The separation of the colored from the white passengers, solely on the ground of race or color, goes to the verge of the carrier's legal right, and such a regulation cannot be upheld unless *bona fide,* and diligently the officers of the ship see to it that the separation is free from any actual discrimination in comfort, attention, or appearance of inferiority. The right of the first-class colored passenger was to have first-class accommodation according to the standard of the after cabin on the same boat, and this, no matter what might be the difficulties arising from the greater number of second-class colored passengers. If it is beyond the

power of the owners of the boat to afford this, then they have no right to make the separation. On many vehicles for passenger transportation, the separation cannot be lawfully made, and the right of steamboat owners to make it depends on their ability to make it without discrimination as to comfort, convenience, or safety.

I pronounce in favor of the libelants, and will sign a decree for $100 in each case.[2]

JOHNSON *v.* PENSACOLA AND PERDIDO RAILROAD CO.

16 Fla. 623. 1878.[1]

MR. JUSTICE WESTCOTT. The next question in order in view of this conclusion is, do the facts set forth in this declaration constitute in law a cause of action?

The facts here alleged are that the defendant, a common carrier, compelled the plaintiff to pay to the defendant, between the first day of July, A. D. 1874, and the first day of March, A. D. 1877, fifty cents per thousand feet on 4,400,000 feet of lumber shipped by plaintiff over said railroad, making an aggregate of $2,200 in excess of what the said defendant charged the Perdido Bay Lumber Company for like transportation over said railroad during the said period, between the first day of July, A. D. 1874, and the first of March, A. D. 1877.

Under the charter of this company it has the general power "to levy and collect tolls from all persons, property, merchandise, and all other commodities transported" on its road. There is no statute in this State regulating the matter of freights and charges by railroad companies. It is not denied that this company is a common carrier. We must, therefore, look to the common law for the settlement of the question involved.

The question here is, what was and is the extent of the obligation of a common carrier at common law to the public, when viewed in reference to charges for tolls and freights?

We have exhausted the material at our hands in the endeavor to ascertain the result of the English cases upon this question. We can find in England or the United States no case involving

[2] See McGuinn *v.* Farbes (1889), 37 Fed. 639; Houck *v.* Southern P. Ry. Co. (1888), 38 Fed. 226; Pullman P. C. Co. *v.* Cain (1897), 15 Tex. Civ. App. 503. Compare Day *v.* Owen (1858), 5 Mich. 520.

See also with regard to discrimination in service: Cumberland T. & T. Co. *v.* Morgan's L. & T. R. R. Co. (1900), 52 La. Ann. 1850; Nichols *v.* Oregon S. L. Co. (1901), 24 Utah, 83; Regina *v.* Sprague (1899), 63 Justice of the Peace, 233; Memphis News Pub. *v.* Southern Ry. Co. (1903), 110 Tenn. 684.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

the precise point here involved, which is, whether, at common law, the defendant, a common carrier, is responsible to the plaintiff for the excess charged him upon the like material and during the same time over a charge for like freights for like material during the same time made of another.

In the case of the Fitchburg Railroad Company *v.* Gage and others (12 Gray, 393), the Supreme Court of Massachusetts held "that a railroad corporation is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates." In speaking of the common law rule, that court says: "It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual *consists in the restricted right to charge in each particular case of service a reasonable compensation and no more.* If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint." The claim made in this case arose out of a difference between the freights upon plaintiff's ice and the price charged others upon the same *class* of freights. It was not upon the same material, but the court treated the case as involving the same principle. It based its conclusion upon the ground that the plaintiff did not set out a case of *excessive or unreasonable charge.* In the last edition of Story on Bailments, we find the rule of the common law thus stated: "At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis." In support of this doctrine the following cases are cited: 12 Gray, 393; 2 P. C., 237; 4 C. B. (N. S.), 78; 12 C. B. (N. S.) 74.

Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same *carriage for a reasonable price, and at a reasonable charge for the service performed;* that the commonness of the duty to *carry for all,* does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, *that for the service performed he shall charge no more than a reasonable sum to him;* that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little

for the service performed, and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract, the common law action by the carrier against the shipper is for a *quantum meruit,* and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person (in this case the amount charged the Perdido Bay Lumber Company), or the usual charge made against many others (the freight tariff) is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured *by the value of the service performed,* and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its *equality,* but because of the relation it bears *to the value of the service performed* as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the State. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed which would authorize a shipper, after being compelled to pay his freights according to established rates (this appears from the pleas and declarations), to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity, or a sale of service at a noncompensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person. If this court sanctions the doctrine of absolute equality, and then measures the damages by the difference in the charge as to one person named in a declaration, which does not negative a fair inducement or consideration for the difference, it must sustain such a rule as that stated.

The declaration, to be good in law, must state a case of excessive charge for the service performed. When it simply states a case of inequality of charge, it states no cause of action, for the

smaller charge may be less than reasonable, and the greater charge may be exactly the value of the service and the reasonable charge for the transportation furnished.

Whether a charge made by A. against B. is reasonable cannot be determined by establishing the charge against C. for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is the compensating sum, and the lower charge may be too small for the service.[2]

COOK AND WHEELER *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

81 Iowa, 551. 1890.[1]

ROTHROCK, C. J. 1. The action is not founded upon any statute, state or federal. The right to recover is based entirely upon the common law pertaining to the duties and obligations of common carriers. By an amended and substituted petition the plaintiffs claimed unlawful and unjust overcharges upon the shipment of 316 car-loads. Each shipment was pleaded in a separate count as a separate cause of action. All of the accounts were alike except in dates of shipment, cars and kinds of stock shipped, and stations from which the shipments were made. It is averred, in

[2] In Great Western Ry. Co. *v.* Sutton (1869), L. R. 4, H. L. 226, MR. JUSTICE BLACKBURN said, at page 237:

"At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

"But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence that way. There was nothing in the common law to hinder the carrier from carrying for favoured individuals at an unreasonably low price, or even gratis. All that the law required was, that he should not charge any more than was reasonable: see *per Byles, J.*, in Baxendale *v.* Eastern Counties Railway Company [4 C. B. (N. S.) 78], and *per Willes, J.*, in Branley *v.* South Eastern Railway Company [12 C. B. (N. S.) 74]. But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the Legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers."

See Cowden *v.* Pacific Coast S. S. Co. (1892), 94 Calif. 470; Spofford *v.* Boston & M. R. Co. (1880), 128 Mass. 326; McNees *v.* Missouri Pac. Ry. Co. (1886), 22 Mo. App. 224.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

substance, in the amended petition that the public tariff rates for shipment of live-stock, from any point in Jasper county during the time the plaintiffs made such shipments, was $60 for one car-load. That the plaintiffs paid the full amount of said rates, and that certain other shippers (who are named in the petition) also paid the full tariff rates; but that said other shippers were allowed and defendant paid to them a rebate or drawback upon each car-load shipped by them, which rebate or drawback was paid by defendant to said shippers, under a private and secret arrangement between the defendant company and said shippers; and that the knowledge of the payment of such rebates was wrongfully and fraudulently concealed from the plaintiffs by the defendant, and said other favored shippers.

The real question in the case is, do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable. In Story on Bailments, § 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood, Ry. Law, 566, it is said: "A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination." In volume 2, p. 95, Redf. R. R., the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his prices. Hence, it was held at an early day that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for

the same service, else it could not be reasonable, either absolutely or relatively." In Hutchinson on Carriers, 243, after a review of the cases, it is said: "Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact unreasonable rates or to make unjust discriminations between shippers which in effect compels one shipper to pay an unreasonable rate.

The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is that some of the others shipped less than the plaintiffs. In short there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers'. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Is it to be supposed that any court or jury under this state of facts would solemnly find, declare, and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable, and the

discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases, by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question. On the contrary, and in support of our conclusion, see Sharpless *v.* Mayor, 21 Pa. St. 147; New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188; McDuffee *v.* Railway Co., 52 N. H. 430; Messenger *v.* Railway Co., 36 N. J. Law, 407.

STATE *ex rel.* ATWATER *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.

48 N. J. L. 55. 1886.[1]

THE relator, an attorney and counselor-at-law, practicing his profession in the city of New York, resides at East Orange, in this state. He testified that he is permanently residing at that place, having resided there since August, 1884, occupying a rented house, the present lease of which expires May 1st, 1886. East Orange is on the line of the Delaware, Lackawanna and Western Railroad, the only railroad between East Orange and New York City. The regular fare between East Orange and New York City is twenty-six cents for a single ticket, and fifty cents for an excursion ticket. Monthly commutation tickets, such as the company is accustomed to sell to persons who apply for them, are sold at the rate of $6.50.

Until March, 1885, the relator was a commuter, purchasing monthly tickets at commutation rates. On the 28th of February, 1885, the relator applied to the company's agent, whose business it was to sell tickets of that class, for a commutation ticket for the ensuing month of March, and tendered the price of the ticket. The agent refused to sell relator a ticket, and assigned as his reason therefor that he had received instructions not to sell the relator commutation tickets. The relator, on the 1st of March, applied again for the ticket, and was again refused.

The opinion of the court was delivered by

DEPUE, J. The Morris and Essex Railroad Company was incorporated in 1835, to construct a railroad for the purpose of carrying passengers and freight. The charter authorized the company to charge for the carriage of passengers and freight, and pre-

[1] Part of the statement of facts and part of the opinion are omitted.— ED.

scribed the limits of the rates to be charged per ton for the transportation of freight, and per mile for the carriage of passengers. Pamph. L., 1835, p. 29, § 10. In virtue of its charter rights and privileges the company became a common carrier of passengers and freight. By legislative authority the Delaware, Lackawanna and Western Railroad Company, as lessee of the company's railroad, was invested with its franchises, rights and privileges (Pamph. L., 1869, p. 28), subject, of course, to all the obligations and duties resting on the lessor.

At this day it would be superfluous to enter upon a discussion to support the doctrine, so well settled, that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving any unjust or unreasonable advantages by way of facilities for the carriage or rates for transporting them. 1 Wood on Railways, § 195. The leading case on this subject is Messenger *v.* Pennsylvania R. R. Co., reported as decided in the Supreme Court in 7 Vroom 407, and in the Court of Errors in 8 Id. 531. In his opinion in the Supreme Court, Chief Justice Beasley says: "It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation upon receiving a reasonable hire. . . . Thus, in the very foundation and substance of the business there was inherent a rule which excluded a preference of one consignor of goods over another. . . . Recognizing this as the settled doctrine, I do not see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions. . . . A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit a common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community." On affirmance of this case the Court of Errors was equally emphatic in affirming the doctrine that a common carrier owes an equal duty to all, which is not discharged if unequal preferences are made, and the enjoyment of the common right is thereby prevented or impaired. How uniformly the doctrine of this case has been adopted and applied, will be seen by the citations and extracts from opinions of the courts of our sister states given by Mr. Justice Atherton, in his opinion in the recent case of Scofield *v.* Lake Shore and Michigan S. R. R. Co., as reported in 1 West. Rep. 821–831. A collection of cases illustrative of the application of the same principle to railroad, express, telegraph, gas and water companies will be found in a note to B. &

O. Tel. Co. *v.* Bell Telephone Co., 24 Am. Law Reg. (N. S.) 578.

There is also a considerable line of cases holding that the carrier may discriminate in the rates charged for the transportation of different classes of goods, or in favor of persons shipping large quantities of freight, or in favor of the long distances for which freight is carried as against shorter distances, or upon grounds which would reduce the trouble or cost of carrying for one party as compared with another. Some of these cases were decided on the "equality clauses" in the English statutes, which our courts have held to be merely declaratory of the common law. Others were decided upon common law principles, without any statutory regulation of the subject. An examination of cases of this class will show that the common law obligation of common carriers to deal with all persons on an equality is tacitly if not expressly recognized; for such discriminations have been upheld only where, under the same circumstances and for the same class of goods, the same rates would be charged to all, or the discrimination, if made under special circumstances, appeared to be just and reasonable. Ransome *v.* E. C. R. R. Co., 1 C. B. (N. S.) 437; 4 *Id.* 135; *In re* Caterham Railway, 1 C. B. (N. S.) 410; *In re* Oxlade, *Id.* 454; Baxendale *v.* G. W. R. R. Co., 5 C. B. (N. S.) 309; Same *v.* Same, 5 *Id.* 336, 354; Nicholson *v.* G. W. R. R. Co., *Id.* 366; Garton *v.* G. W. R. R. Co., *Id.* 669; Garton *v.* B. & E. R. R. Co., 6 C. B. (N. S.) 639; Baxendale *v.* E. C. R. R. Co., 4 *Id.* 63; Evershed *v.* L. & G. W. R. R. Co., L. R., 2 Q. B. Div. 254, 267; Crouch *v.* L. & W. R. R. Co., 2 C. & K. 789, 804; 1 Wood on Railways, §§ 197, 198; 3 *Id.* 496; Stewart *v.* L. V. R. R. Co., 9 Vroom 505, 520. And it is indisputable that where the carrier has a fixed schedule of rates for carriage for the public generally, a demand from one person of a higher rate for the same service would be unlawful, although the rate demanded was less than its charter allowed; for such an incorporated company has the double duty to keep within the limit of charges prescribed by its charter, and also to conform to that common law obligation to observe equality in charges with respect to all which the law of the land lays upon the business for which it was incorporated.

The principle above stated is applicable to the case in hand. In virtue of the charter under which the company transacts its business it is a common carrier of passengers as well as of goods, and in that capacity is obliged to carry all passengers who are ready to pay for their transportation, and liable to an action at the suit of any one whom it refuses to carry without lawful excuse. Story on Bailm., § 591; Bennett *v.* Dutton, 10 N. H. 481; Jencks *v.* Coleman, 2 Sumn. 221; Benett *v.* P. & O. Steamboat Co., 6 C. B.

775; Beekman *v.* S. & S. R. R. Co., 3 Paige 45. And, as was said by the court in the Messenger case, in virtue of its charter rights and privileges, the company is a public agent, and as such agent is placed under a duty to exercise its calling with perfect impartiality towards all persons. Carrying passengers upon commutation tickets at less rates than the charges for single tickets has become a usual mode with railroad companies in prosecuting the carrying business. It is a mode of transacting business of substantial benefit to those who are able to avail themselves of the privilege, and at the same time is greatly conducive to the growth and prosperity of parts of the state lying adjacent to the large cities. Indeed, a considerable, if not a greater part of the passenger carrying business in localities contiguous to the great business centres of the country is transacted under this system, and the rental and market value of lands in such localities is largely determined by the ability to procure transportation at reduced commutation rates. The denial of this privilege to a particular individual is to him a substantial injury. A company is under no obligation to establish commutation rates for a particular locality, but when it has established such rates, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances, and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business. There is not a perceptible shade of difference between the denial of a commutation ticket under such circumstances, and the refusal to sell the same individual an ordinary ticket at the customary rate, and demanding of him for transportation the utmost price allowed in the company's charter in excess of the usual price at which such tickets are sold to the public, and such a denial cannot be made to square with the principles laid down and emphasized in the Messenger case.[2]

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE AND OHIO RAILROAD CO.

145 U. S. 263. 1892.[1]

Mr. Justice Brown, after stating the facts, delivered the opinion of the court.

[2] See that part of Scofield *v.* Railway Co. (1885), 43 Oh. St. 571, not reprinted *infra*, p. 352.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— Ed.

Prior to the enactment of the act of February 4, 1887 (24 St. p. 379), to regulate commerce, commonly known as the "Interstate Commerce Act," railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service,— Fitchburg Railroad Co. *v.* Gage, 12 Gray, 393; Baxendale *v.* Railway Co., 4 C. B. (N. S.) 63; Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 237; *Ex parte* Benson, 18 S. C. 385; Johnson *v.* Railway Co., 16 Fla. 623,— though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the state, the impossibility of securing concerted action between the legislatures towards the regulation of traffic between the several states, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by congress under its constitutional power to regulate commerce among the several states. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It

is not all discriminations or preferences that fall within the inhibition of the statute,—only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburgh; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice BLACKBURN in Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as party rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret

rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes etc., and ministers of religion,— in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same state must be illegal. In view of the fact, however, that every railways company issues such tickets; that there is no reported case, state or federal, wherein their legality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public,— it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously

within the commuting principle. As stated in the opinion of Judge SAGE in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer to meet the needs of the commercial traveler, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25 or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita,* then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of

freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore affirmed.

SCOFIELD *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO.

43 Oh. St. 571. 1885.[1]

THE plaintiffs, Scofield, Shurmer & Teagle, filed their petition in the court of common pleas, and therein alleged, in substance, that since 1875 they have been manufacturers of and dealers in refined and other products of petroleum at Cleveland. That dur-

[1] Only an extract from the statement of facts and an extract from the opinion are here reprinted.— ED.

ing the same time the Standard Oil Company was largely engaged in the same business. That defendant, The Lake Shore and Michigan Southern Railway Company, was the owner of a line of railroad passing through Cleveland, and extending from Buffalo, New York, to Chicago, Illinois, with branches to Detroit and Grand Rapids, in Michigan. That it was amply supplied with proper equipment to receive and carry the product of plaintiffs. That it made and published tariff rates for the transportation of oil in barrels, which plaintiffs were at all times charged, in common with all other manufacturers in Cleveland except the Standard Oil Company, which plaintiffs say was largely in excess of the rates charged to and paid by the Standard Oil Company to the same points and places.

ATHERTON, J. The case of Hays *v.* Pennsylvania Company, 12 Fed. Rep. 309, decided by Baxter, J., in the circuit court of the United States, for the northern district of Ohio, is important in respect to one element in this case. The defendant in the case at bar claims that it was proper to enter into the contract it did with the Standard Oil Company, on account of the very large amount of freightage that company annually furnishes, and that it was lawful to discriminate in their favor on that account. The plaintiffs in that case had been engaged for several years in mining and shipping coal from Salineville, and the defendant's railroad furnished them their only means of getting their coal to market. The railroad company discriminated in favor of every shipper who shipped five thousand tons or over, and the discrimination was from thirty to seventy cents per ton, graduated by the amount shipped.

Plaintiffs were required to and did under the discrimination pay a higher rate than their more favored competitors. They brought suit to recover for the discrimination, and, under the instructions of the trial judge, the jury returned a verdict for plaintiffs.

The judge on a motion for a new trial said:

"The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an *equal* and *impartial participation* in the use of the facilities it is capable of affording. . . .

"The discrimination complained of rested exclusively on the *amount of freight supplied by the respective shippers during the year.* Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man

engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and *to everybody else interested in any business* requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities; and, perhaps, tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations, and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized *for the common benefit of every one,* and can not be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which can not be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, *constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight,* and solely on that ground, *is* a *discrimination* in favor of *capital,* and is *contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party,* for which the courts are competent to give redress."

The district court, in their finding 10½, state that shipment by the car-load was the manner in which nearly all the business was done. That on the request of either party to furnish cars, the

defendant had them switched to the refineries, and after being loaded were switched back and placed on defendant's tracks for shipment on its road.

The manner of making shipments for plaintiffs and for the Standard Oil Company was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of Baxter, J., as the better law, and hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be sustained. The principle is opposed to a sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money and drive out all enterprise not backed by overshadowing wealth. With the doctrine, as contended for by the defendant, recognized and enforced by the courts, what will prevent the great grain interest of the north-west, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregated wealth and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves?

The defendant can derive no benefit or advantage in this case from its contract with the Standard Oil Company, and its discriminations can not be upheld because of the existence of the same.[2]

WIGHT *v.* UNITED STATES.

167 U. S. 512. 1897.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line,

[2] Compare Nichalson *v.* Great W. R. R. Co. (1858), 5 C. B. (N. S.) 366. In Carr *v.* Northern Pac. Ry. Co. (1901), 9 I. C. C. R. 1, 14, the Commission said: "It is not always enough that open rates are made and strictly observed, even if fair and reasonable for the service rendered; nor is it sufficient in every case that a relation of rates, just from the carrier's standpoint, is maintained as between shipments of the same article by different methods and in different quantities. For example, a carload rate lower than the less than carload rate, where the difference is not too great, would ordinarily be lawful; but a still lower rate for shipments of a hundred or a thousand carloads, though duly published and impartially applied, would be wholly indefensible. If a low rate is granted on conditions with which only a few can comply that rate is presumably unfair and may be extremely prejudicial to all other shippers of like traffic, because they are practically unable to meet the terms upon which it is offered."

With regard to difference in rates as justified by difference in the amount of service, see State *v.* Sedalia G. L. Co. (1889), 34 Mo. App. 501; Silkman *v.* Yonkers W. Com. (1897), 152 N. Y. 327.

[1] The statement of facts and part of the opinion are omitted.— ED.

the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which, for 15 cents per hundredweight, it would bring the beer from Cincinnati, and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage, by whichever road it was carried. His warehouse was, in a direct line, 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions," within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carrier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that

it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true, he formally paid 15 cents, but he received a rebate of 3½ cents; and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier, "directly or indirectly by any special rate, rebate, drawback or other device," to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute; for it requires the common carrier, in publishing schedules, to "state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefore.

It may be that the phrase, "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the district court is affirmed.

MR. JUSTICE WHITE concurs in the judgment.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA MIDLAND RAILWAY CO.

168 U. S. 144. 1897.[1]

MR. JUSTICE SHIRAS delivered the opinion of the court.

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other

[1] The statement of facts, arguments of counsel, part of the opinion of MR. JUSTICE SHIRAS and the dissenting opinion of MR. JUSTICE HARLAN are omitted.— ED.

things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, Cincinnati, and from New York, Baltimore, and other Northeastern points, and the defendant common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendant common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments, or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities, and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the interstate commerce commission, under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended in the briefs filed on behalf of the Interstate Commission that the existence of rival lines of transportation, and consequently of competition for the traffic, are not facts to be considered by the Commission or by the courts when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 Fed. 315; Missouri Pac. Ry. Co. *v.* Texas & P. R. Co., Id. 862; Interstate Commerce Commission *v.* Atchison, T. & S. F. R. Co., 50 Fed. 295; Interstate Commerce Commission *v.* New Orleans & T. P. R. Co., 56 Fed. 925, 943; Behlmer *v.* Railroad Co., 71 Fed. 835; Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409.

In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. Denaby Colliery Co. *v.* Manchester, S. & L. Ry. Co., 11 App. Cas. 97; Phipps *v.* Railway [1892] 2 Q. B. Div. 229.

In Texas & P. R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, it was held that, "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of Wight *v.* United States

167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase, "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended on behalf of the appellant that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the interstate commerce commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this: That when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows:

"That upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the commission. On the contrary, in the case of In re Louisville & N. R. Co. *v.* Interstate Commerce Commission, 1 Interst. Commerce Com. R. 57, the commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words, "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful, if it was so before; and that which it fails to forbid the carrier is left at liberty to do, without permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Be-

yond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences, but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the circuit courts. Interstate Commerce Commission *v.* Atchison, T. & S. F. R. Co., 50 Fed. 300; Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 942; Behlmer *v.* Railroad Co., 71 Fed. 839. And we do not think the courts below erred in following it in the present case. We are unable to suppose that congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the commission shall authorize them so to do. Much less do we think that it was the intention of congress that the decision of the commission, if applied to, could not be reviewed by the courts.[2]

AYRES *v.* CHICAGO AND NORTHWESTERN RAILWAY CO.

71 Wis. 372. 1888.[1]

CASSODAY, J. This case was here on a question of pleading upon a former appeal. 58 Wis. 537. The amended complaint is to the effect that the defendant, being a common carrier engaged in the transportation of live-stock, and accustomed to furnish cars for all live-stock offered, was notified by the plaintiffs, on or about October

[2] See Louisville & N. R. R. Co. *v.* Behlmer (1900), 175 U. S. 648; East Tenn. V. & G. Ry. Co. *v.* Int. Com. Com. (1901), 181 U. S. 1.
See Interstate Commerce Act §4, as amended in 1910, Appendix, p. 487. and the interpretation of the amended section in Intermountain Rate Cases (1914), 234 U. S. 476.

[1] Part of the statement of facts and part of the opinion are omitted.— ED.

13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station La Valle, and three at its station Reedsburg, ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a par-

ticular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS CENTRAL RAILROAD CO.

215 U. S. 452. 1910.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, (a) of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; (b) the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads, consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and (c) because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points, to be sold after arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points.

It is disclosed that the railroads of the United States generally, at various times, put in force regulations for the distribution of coal cars. Generally speaking, these regulations provide for fixing the capacity of coal mines in order to determine the number of cars to which each might normally be entitled to daily move its output of coal. And these regulations also provide for a method of determining the *pro rata* share of the cars daily allotted for distribution in times of car shortage. Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage were identical

[1] The arguments of counsel and part of the opinion are omitted.— ED.

among the various railroad systems of the United States. The divergence, and even conflict, between those systems, is illustrated by the cases of Logan Coal Co. *v.* Pennsylvania R. Co., 154 Fed. 497; United States *ex rel.* Pitcairn Coal Co. *v.* Baltimore & O. R. Co., 91 C. C. A. 147, 165 Fed. 113; cases cited at pages 503 and 504 of the report of the Logan Coal Co. Case, and the case of Majestic Coal & Coke Co. *v.* Illinois C. R. Co., 162 Fed. 810.

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines, or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage, dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company, and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier, and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or consumers, and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway fuel cars, that is, cars owned by other railroad companies, and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that mine in such cars, and upon the basis thus resulting apportioned ratably, in case of shortage, the system cars; that is, those embraced in class 1. On the other hand, the other class of regulation not only took no account of the cars in classes 2, 3, and 4, as a means of rating the capacity of the mine, but moreover did not charge against any mine, for the purpose of ascertaining the daily *pro rata* of the cars to which such mine was entitled, any car whatever furnished such mine on such day embraced within classes 2, 3, and 4, that is, any company fuel car, foreign railway fuel car, or private car. By this system, therefore, where a mine was entitled daily to a given *pro rata* of the cars subject to general distribution, it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars, and private cars as

might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars, and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the classes was taken into account in fixing the *pro rata* for distribution.

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory, in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars in determining the distribution of coal cars among the various coal operators along the lines of the railroad on interstate shipments of coal. It appears that the complaint just referred to was heard before the Commission, with two other complaints against other railroads, involving the same general subject.

Although the complaint in the case of the Illinois Central Railroad Company differed from the complaints in the two other cases which were considered and passed upon by the Commission at the same time, in that it did not assail the failure to take into account the company fuel cars in making distribution in times of car shortage, nevertheless the Commission declared that the Illinois Central Railroad Company, both in its brief and argument, had conceded the importance of the subject to that company, and had invoked the action of the Commission thereon.

The order of the Commission, as heretofore stated, therefore, not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars, and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars, and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine, the order only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number.

Being unwilling to comply with the order of the Commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the Commission. A certificate as to the public importance of the cause was filed by the attorney general, in compliance with § 16 as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), and the cause was thereafter submitted at the same time with one brought by the Alton Railroad, involving a similar question, to a circuit court held by Judges Grosscup, Baker, and Kohlsatt. A single opinion was announced in both cases.

From the final decree enjoining the Commission from enforcing its order, in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage, and in so far as it directed the future taking such cars into account, the Interstate Commerce Commission appeals.

As the Interstate Commerce Commission alone has appealed, it is patent that those portions of the order of the Commission which concern foreign railway fuel cars and private cars, and which the court below refused to enjoin, are not open to inquiry. The suggestion at once presents itself whether, if these subjects are not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits. In view, however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.

FIRST. *That the act to regulate commerce has not delegated to the Commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.*

When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form, these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under

the conditions stated is not commerce, it is therefore not within the authority delegated to the Commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce.

We think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this: that commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on,— a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons *v.* Ogden, 9 Wheat. 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one.

The corporation, as a carrier engaged in interstate commerce, being, then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and the instrumentalities employed for the purpose of such commerce being likewise so subject to control, we are brought to consider the remaining proposition, which is:

Second. *That, even if power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.*

In view of the facts found by the Commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the Commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce, prohibiting preferences and discriminations. But it is contended that although this be the case, as the order of the Commission not only forbade the preferences and discriminations complained of, but also commanded the establishment of a rule excluding such discriminations for a future definite period of not exceeding two years, the order transcended the

authority conferred upon the commission. This proceeds upon the assumption that § 15 of the act to regulate commerce, as enacted by the act of June 29, 1906, while conferring upon the Commission the authority, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, has no relation to complaints concerning preferences or discriminations, unless such practices, when complained of, are of a character to affect rates, which it is insisted is not here the case. The pertinent part of the section in question (15) reads as follows:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property, as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

"All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power, so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically ex-

amine the provision relied upon, for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the interstate commerce act had necessitated, and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the Commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.

Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the Commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself, not to the right to purchase, but to the duty to make equal distribution of cars. The right to buy is one thing, and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal, and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition; that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple

of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the Commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER dissents.

GAMBLE-ROBINSON COMMISSION CO. *v.* CHICAGO AND NORTHWESTERN RAILWAY CO.

168 Fed. 161. 1909.[1]

SANBORN, Circuit Judge. Section 3 of the act of February 4, 1887, commonly called the "Interstate Commerce Act," provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 380, c. 104 (3 U. S. Comp. St. 1901, p. 3155).

Is it a violation of this section for a common carrier which customarily delivers to consignees a certain class of freight, holds the freight bills until after any question arising concerning the correctness of any transportation charges upon its line and upon connecting lines over which the freight has been transported has been

[1] The statement of facts, part of the opinion of SANBORN, J., and all of the dissenting opinion of HOOK, J., are omitted.— ED.

adjusted, and then collects them, to refuse to grant such a credit to a particular consignee and to require prepayment of freight bills by it while it still continues to extend credit to others similarly situated? In other words, is it a violation of this section for a railroad company to refuse to loan to one consignee without interest the moneys owing to it for transportation charges earned by it and for those paid by it to connecting lines until the consignee's claims that such charges are incorrect have been settled, when it customarily makes such loans to other consignees? This is the question which this case presents, and it is well to perceive clearly the nature of the controversy inherent in it and the amount actually involved before entering upon the discussion of the issue it presents.

Prior to the enactment of the act of February 24, 1887, to regulate commerce among the states, interstate railway traffic was regulated by the principles of the common law, and under those principles common carriers had the right to require the prepayment of charges for freight of one or more persons or corporations, and to give credit for such charges to other persons or corporations similarly situated. Interstate Commerce Commission *v.* Baltimore & Ohio R. R. Co., 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699; Southern Indiana Express Co. *v.* United States Express Co. (C. C.) 88 Fed. 659, 662; Randall *v.* Railway Company, 108 N. C. 612, 13 S. E. 137.

That act left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are "undue and unreasonable."

The question, therefore, is, did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier customarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.

The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon "the same principles which are regarded as sound, and adopted in other trades and pursuits."

The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness.

Finally, the question at issue in this case in the presence of a custom and usage not to demand prepayment of transportation charges, in the presence of a motive and purpose by the defendant to harass and oppress the plaintiff by the demand of such prepayment, and in the presence of the subjection of the plaintiff in that case to very much more aggravated prejudice and disadvantage than those alleged in the action under consideration, was presented, decided, and the considered opinion of this court upon it was delivered by Judge Thayer in 1894 in these words:

"It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. Oregon Short Line & U. N. Ry. Co. *v.* Northern Pacific R. Co. (C. C.) 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to

collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common-law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not 'subject any particular person, company, corporation or locality . . . to any undue or unreasonable . . . disadvantage in any respect whatever.' This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue or unreasonable.' One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common-law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise." Little Rock & Memphis R. Co. *v.* St. Louis S. W. R. Co., 63 Fed. 777, 11 C. C. A. 419 (26 L. R. A. 192).

The question was decided in the same way by Mr. Justice Field in the Circuit Court in Oregon Short Line & U. N. Ry. Co. *v.* Northern Pacific R. R. Co., 51 Fed. 465, 473, 474, affirmed by the Circuit Court of Appeals of the Ninth Circuit in 9 C. C. A. 409, 410, 412, 413, 414, 61 Fed. 158, 159, 161, 162, and by the Circuit Court of Appeals of the Fifth Circuit in Gulf, C. & S. F. Ry. Co. *v.* Miami S. S. Co., 30 C. C. A. 142, 154, 155, 86 Fed. 407, 419, 420. It is more than 14 years since this court rendered that decision, no contrary opinion of any national court upon this question has been called to our attention, and because the right of a common carrier to require prepayment of charges for transportation from one and

to give credit for them to another similarly situated existed under the common law, because neither this right nor its exercise were made unlawful by the terms of the interstate commerce act, because the exercise of that right is not in itself unreasonably prejudicial, or disadvantageous, because the former decision of this court rules this case and ought not to be overruled unless it is clearly wrong, and because upon a careful reconsideration of that decision in the light of the subsequent decisions of the courts we are still convinced that it was right, our conclusion in this case is that the requirement by the plaintiff of the prepayment of charges by the defendant for the transportation of its freight, while no such requirement was made of others similarly situated, while there existed a custom or usage for the carrier to advance the charges of connecting carriers, to deliver the freight to the consignees, to hold bills for freight until claims arising out of errors in transportation charges were adjusted, and then to collect them, did not subject the plaintiff to undue or unreasonable prejudice or disadvantage or give to others similarly situated any undue or unreasonable preference or advantage within the meaning of section 3 of the interstate commerce law, and the judgment below must be affirmed.

It is so ordered.[2]

INTERSTATE COMMERCE COMMISSION *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.

220 U. S. 235. 1911.[1]

In 1899 the railroads in the so-called Official Classification territory adopted the following rules:

"Rule 5–B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor, it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)

. . . . . .

"Note. Rule 5–B will apply only when the consignor or consignee is the actual owner of the property.

[2] See Allen *v.* Cape Fear & Y. V. R. R. Co. (1888), 100 N. C. 397; Baltimore & O. R. R. Co. *v.* Adams Express Co. (1884), 22 Fed. 404; Yancy *v.* Batesville Tel. Co. (1907), 81 Ark. 486; Adams Express Co. *v.* State (1903), 161 Ind. 328.

[1] The statement of facts here given is substituted for that contained in the opinion, and the arguments of counsel, and part of the opinion are omitted.—Ed.

"Rule 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be way-billed as separate shipments, and freight charged accordingly. (See note.)

"Note. The term 'forwarding agents,' referred to in this rule, shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin."

Certain forwarding agents, against whom the above rules had been enforced, appealed to the Interstate Commerce Commission for relief. The restriction created by the above rules were declared void, and reparation was awarded. The railroad companies did not comply with this order, but filed a bill to enjoin the enforcement of the order and to have it declared void.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition: that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry; or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. Baltimore & O. R. Co. *v.* United States *ex rel.* Pitcairn, 215 U. S. 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court, because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn act, and because the

decision below was made in June, 1909, before the announcement of the opinion in the Pitcairn Case. The reasons above stated also serve to narrow the contentions pressed at bar, since such contentions likewise in their essence but reiterate the conflict of opinion which developed in the Commission, but which, for the reasons stated, are, for the purpose of our review, substantially reducible to the one legal question which we have stated. We shall therefore confine ourselves to a consideration of that question and to such brief notice of the other contentions urged as will make clear that they depend ultimately upon conclusions of fact not open in this court for review.

The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that, as the section forbids a carrier from charging "a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, . . . than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," authority is to be implied for basing a charge for transportation upon ownership or nonownership of the goods tendered for carriage, upon the theory that such ownership or nonownership is a dissimilar circumstance and condition within the meaning of the section.

But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the "Equality Clause." Texas & P. R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 222. Certain also is it that, at the time of the passage of the act to regulate commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. Great Western R. Co. *v.* Sutton (1869) L. R. 4 H. L. 226; Evershed *v.* London & N. W. R. Co. (1878) L. R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351, and Denaby Main Colliery Co. *v.* Manchester, S. & L. R. Co. (1885) L. R. 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us. Wight *v.* United States, 167 U. S. 512; Interstate Commerce Commission *v.* Alabama Midland R. Co. 168 U. S. 144, 166.

As these considerations are decisive of the only legal question which, as we have already pointed out, the case involves, and also refute a subordinate contention that a forwarding agent is not a person within the meaning of that word as employed in the second section of the act to regulate commerce, we are brought, as we have hitherto said, to briefly refer to minor considerations pressed in argument, so far as they seem to us to be of sufficient weight to be entitled to particular notice.

First. It is urged that, as the wide range of carload rates and the extent of the facility for combining articles for the purpose of obtaining such rates allowed in Official Classification territory are the result of the voluntary act of the railroads, therefore the power existed in the railroads to restrict and limit the enjoyment of such rate, as was done by the assailed rules. In the interest of the public it is urged a limitation should not be now enforced

which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates, it has the right to discriminate as to those who shall be entitled to avail of them. Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to re-examine.

Second. Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a "dealer in railroad transportation," and depends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less than carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations. But in the absence of any statutory authority to exclude the forwarding agent, and basing the right to exclude merely upon the assumption that the nature and character of his business would produce discrimination, and therefore justify the exclusion, the contention is not open for our consideration, because, like the previous one, it is foreclosed by the finding of fact of the Commission. Indeed, this is not merely the result of an implication from the finding of the Commission, since it was affirmatively found that to permit the carrier to exclude the forwarding agent would be to produce preference and discrimination. The contention, then, comes to this,— that carriers should be permitted to give preferences and make discriminations as a means of preventing those unlawful conditions from arising.

Third. It is said that as the business of the forwarding agent is in a sense competitive with that of a carrier, and may largely diminish the revenue derived by railroad companies from their less-than-carload rates, and hence cripple their ability to successfully conduct business, therefore the right to exclude the forwarding agent, even if there is no power to exclude the owner or the ordinary agent of owners, should be permitted. This, however, again, in a twofold sense, is directly in conflict with the findings of fact made by the Commission; first, because it disregards the findings as to the operation of the business of a forwarding agent, and,

second, because it overlooks the express finding of the Commission that it would be so difficult, if not impossible, for the carrier to determine in practice the nature and character of the title of a person tendering goods for shipment that the necessary result of a rule excluding a forwarding agent would be to embarrass shipments by owners or their special agents, and thus beget universal uncertainty and constant discrimination and preference against owners.

As it follows, from the reasons just stated, that the court below erred in annulling the order of the Commission and enjoining its enforcement, its decree to that effect is reversed, and the case is remanded, with directions to dismiss the bill.[2]

RAILROAD DISCRIMINATION CASE.

136 N. C. 479. 1904.[1]

CLARK, C. J. The gist of this action is for discrimination by the defendant in charging the plaintiff a higher rate on logs to the plaintiff's mill in Wilmington than was charged others for like service, and to recover the overcharges, which had been paid under protest. The point presented is not that the rate ($2.50 per thousand feet in car-load lots) charged the plaintiff is *per se* unreasonable, but that the rate charged others for the same service for the same distance was $2.10, and that this is a serious discrimination, which, if continued, will result in the crippling or destruction of the plaintiff's mill, and the building up of other mills which are in competition with the plaintiff, for it has in five months amounted to $3,900, for the recovery of which this action is brought.

The court charged the jury: "If you find that the rate of $2.10 per thousand feet was charged and collected by the defendant upon logs shipped over any part of its railroad to a mill or mills at which logs were manufactured into lumber, and the lumber itself reshipped over the railroad of the defendant, or any part of it, and that the reduced rate of $2.10 per thousand feet was given to such mill in consideration of such fact that they would ship the lumber manufactured out of the said logs over the line of the defendant's road, which said agreement was open to all mills that wished to accept it, then it would not be an unjust or illegal

[2] Compare Camblos *v.* Phil. & R. R. R. Co. (1873), Fed. Cas. 2,331, and Johnson *v.* Dominion Exp. Co. (1896), 28 Ontario, 203.

[1] Part of the opinion of CLARK, C. J., and all of the concurring opinion of CONNOR, J., are omitted.— ED.

discrimination to charge $2.50 per thousand feet, which it is not contested is a reasonable rate to mills which did not ship their manufactured lumber over the line of the defendant road."

The proposition herein stated is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line) which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff. It is charged $2.50 while others are charged $2.10 for the same service. It is true, if the plaintiff should choose to agree to ship its manufactured lumber out of Wilmington over the defendant's line, it could get the same reduction of rate on its logs into Wilmington. On those conditions it could save itself from being discriminated against. But suppose the plaintiff should wish to sell its lumber in Wilmington, or can ship it at a lower rate by sea, or even by a competing railroad line out of Wilmington, has it not the right to do so? Should it see fit to exercise that right, has the common carrier the power to place a penalty of a 19 per cent. higher rate on the plaintiff, and to charge it $2.50 for bringing its logs to Wilmington, when it charges others $2.10 for exactly the same service?

The principle involved is a vital one to the public at large, for upon this alleged right to discriminate by common carriers, exercised either openly or secretly by rebates, nearly all trusts, and especially the Standard Oil Company, have been built up to their present disquieting and menacing predominance, as has been fully shown by the investigation and report of the Industrial Commission and the Interstate Commerce Commission, both appointed by acts of Congress.

Here the railroad company will doubtless make up, out of its forced monopoly of shipping out of Wilmington the lumber to be manufactured out of all the logs hauled in by it, the 40 cents which is deducted in favor of those who will give it that monopoly. But why should it discriminate by charging the plaintiff $2.50 instead of $2.10; *i. e.*, charge 19 per cent. higher rates upon logs which when turned into lumber are sold in Wilmington, or shipped by sea, or shipped by a competing route? It cost no more to bring in the plaintiff's logs than the logs for whose hauling only $2.10 was charged. The shipment of logs to Wilmington is one transaction. The shipment of lumber out is another. The defendant cannot charge the plaintiff higher on the logs because it will not

agree to ship its lumber by the defendant's line. It is no answer to say that, if the plaintiff will come to the defendant's terms, it will get the same discount. The defendant might as well say, "If you will carry your logs to a sawmill in which the railroad company is a large owner, you will get 19 per cent. reduction in freight on your logs, and there is no discrimination, for the same offer is open to you as to others."

If the plaintiff, like others, was shipping logs to Wilmington with the voluntary intention of shipping by the defendant's road, say to New York, then certainly there would be no discrimination. But the plaintiff does not wish to ship to New York over the defendant's line, and the defendant proposes "to put the screws to the plaintiff," and make it do so, whether it wishes to do so or not; and, if the plaintiff does not do so, the defendant says the plaintiff cannot be treated as well as others as to the rates for hauling its logs, but must pay nearly one-fifth (19 per cent.) higher rates on its logs. That is the very point at issue. Hauling its logs to Wilmington is the only service the plaintiff seeks at the defendant's hands. Why should it pay higher for that service than those who agree to carry their logs to the defendant's mill, or to ship out their lumber by the defendant's road?

The point here presented has been often decided, and always — certainly at least in recent years — against the power claimed by the defendant. In Baxendale *v.* Railroad, 94 E. C. L. 308, after an elaborate argument, it was held by a very strong court as to this very point: "It is not a legitimate ground for giving a preference to one of the customers of a railroad company that he engages to employ other lines of the company for the carriage of traffic distinct from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not, to bind himself to employ the company in other and totally distinct business."

In Menacho *v.* Ward (C. C.) 27 Fed. 529, where the court was enlightened by the argument of Frederick Coudert and James C. Carter on opposing sides, it was held that "a common carrier cannot charge a higher rate against shippers who refuse to patronize it exclusively." [2]

[2] But see Hoover *v.* Pennsylvania R. R. Co. (1893), 156 Pa. St. 220; Lough *v.* Outerbridge (1894), 143 N. Y. 271.

BOERTH *v.* DETROIT CITY GAS CO.

152 Mich. 654. 1908.[1]

CARPENTER, J. Did the making of a 60 cent rate to those who use gas engines constitute an unjust or unlawful discrimination entitling complainant to relief? Defendant does discriminate in its charges for gas. It charges those who use gas for illuminating purposes 90 cents per 1,000 cubic feet; those who use it for fuel purposes 80 cents per 1,000 cubic feet; those who use it for power 60 cents per 1,000 cubic feet. The discrimination between the use for illuminating purposes and fuel purposes was authorized by the ordinance of the city of Detroit. The discrimination between the use for fuel purposes and the use for power purposes was not authorized by that ordinance. The ground of that discrimination is this: That those who use gas for power purposes use on an average much more than those who use it for fuel purposes, and that if they could not get it at the reduced rate they would use some other material for the purpose of creating power. Counsel for each party have elaborately briefed the question of the lawfulness of this discrimination. We shall not, however, undertake to decide that question. It is not necessary to decide it in order to determine this case. The question is not likely to arise again, for since this suit was commenced a new ordinance has been passed by the city of Detroit authorizing that discrimination.

We do not undertake to decide the unlawfulness of the discrimination in question, because, in our judgment, it affords no ground upon which complainant is entitled to relief. Complainant is not entitled to relief because the rate of 80 cents per 1,000 cubic feet is too high, for that was the rate which defendant was entitled to charge. His claim for relief must rest upon the ground that the rate charged those who used gas for power purposes is too low. He cannot complain of this unless he is in some way injured. The circumstance that a manager of a public utility is granting unlawful favors to one of several individuals — and we do not decide that that was done in this case — does not give a right of action to every member of the community. That is a grievance to be redressed by the public. On principle it cannot be redressed by an individual unless he is specially aggrieved thereby. As was said in Hays *v.* Penn. Co. (C. C.) 12 Fed. 309: "It may be said that it is only when the discrimination inures to the undue advantage of one man in consequence of some injustice

[1] Only an extract from the opinion is here reprinted.— ED.

inflicted on another that the law interferes for the protection of the latter." See, also, Hozier *v.* Caledonian Ry. Co., 17 Sess. Cases (2d series) 302. The users of gas engines who receive the reduced rates were in no just sense competitors of complainant. The reduced rates gave them no undue advantage over him. They did not injure him. They, therefore, afford no ground upon which he can claim relief.

The decree dismissing complainant's bill is affirmed.[2]

M'NEILL *v.* DURHAM AND CHARLOTTE RAILROAD CO.

132 N. C. 510. 1903.[1]

CLARK, C. J. This is an action for personal injuries alleged to have been received by the plaintiff April 6, 1900, by negligence of the defendant, while traveling on its road. The defendant, in its answer, among other things, avers that the plaintiff was a "trespasser on its train, having tendered to defendant no ticket, money, or compensation whatever for its fare — only a free pass, which had expired 1st January previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person, or loss or damage to his baggage. The plaintiff testified that he was "editor of the Carthage *Blade,* a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper, as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900." It is true, he said he told the conductor he would pay the fare; but, upon his making the above statement, the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not willfully and wantonly injure him. Cook *v.* Railroad, 128 N. C. 333, 38 S. E. 925. The General Assembly (Laws 1891, p. 277, c. 320, § 4) provided that "if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered

[2] Compare Bailey *v.* Fayette G. & F. Co. (1899), 193 Pa. St. 175; Commonwealth *v.* Louisville & N. R. R. Co. (1902), 112 Ky. 75.

[1] Part of the opinion is omitted.— ED.

or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands or receives from any other person or persons for doing for him or them, a like and contemporaneous service in the transportation of a like kind of traffic under substantial similar circumstances and conditions such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter (page 286) contains the exceptions which permit handling free and at reduced rates property of the United States, state or municipal governments, or for charitable purposes, or to or from fairs, and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or any department thereof, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indignant persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes: nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees." These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine "not exceeding five thousand dollars" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but, let it be what it may, it could not amount exactly —"neither more nor less"— to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimina-

tion to sell the plaintiff transportation on credit, and not payable in money.

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than one thousand nor more than five thousand dollars." While the plaintiff was not himself made indictable, as in some states, he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are in *pari delicto*, and the court will leave the parties to settle their own controversy over damages for a breach of a contract forbidden by law.

In Cook *v.* Railroad, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In Pierce *v.* Railroad, 124 N. C. 83, 32 S. E. 399, 41 L. R. A. 316, a boy had jumped on a switching train, and was riding thereon, contrary to the town ordinance. The court held that the company was liable in such cases only for any willful or wanton injury inflicted by the employees of the company. Here the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy, or the stealing of a ride by a tramp. To same purport, Richmond & D. R. Co. *v.* Burnseed (Miss.) 35 Am. St. Rep. 656, and notes; Hardyer *v.* R. Co., 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated, reputable gentleman — a member of an honorable profession; but, being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the statute, his rights as against the company are the same as those others who were also riding contrary to law. He neither shows nor avers willful, wanton, or malicious injury, and cannot recover.

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting, 4 Elliott, R. R. § 1608, and can only be considered when the pass is issued in one of the cases permitted by our statute. They have no application to a case like this, where the contract of free carriage is illegal, and the parties are in *pari delicto*.

This is the first case in which the illegal discrimination is set

up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations.

In refusing to grant judgment as of non-suit, there was error.

DOUGLAS, J. (dissenting). I am inclined to think that in *pari delicto* is not a defense to a tort arising from the negligence of the defendant.[2]

UNITED STATES *v.* BALTIMORE AND OHIO RAILROAD CO.

231 U. S. 274. 1913.[1]

MR. JUSTICE LURTON delivered the opinion of the court.

This appeal involves the legality of an order made by the Interstate Commerce Commission, holding that certain allowances made by the appellees to Arbuckle Brothers on sugar shipped by them over one or another of the railroad companies' lines constitute an illegal preference or discrimination in violation of the act to regulate commerce. The order of the Commission required the railroad companies to cease and desist from paying such allowances, "while at the same time paying no such allowances to the Federal Sugar Refining Company," on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 Inters. Com. Rep. 200. The carriers affected filed a bill in the Commerce Court, alleging the invalidity and illegality of the order, and sought an injunction *pendente lite* and a permanent injunction against its enforcement. An injunction until the cause could be finally heard was granted by the Commerce Court. This was appealed from by the United States and the injunction sustained as within the sound discretion of the court below. 225 U. S. 306. Thereupon the cause was finally heard upon motion of the appellants to dismiss the bill for want of equity, all answers and pleas theretofore filed having been withdrawn. The Commerce Court denied this motion and sustained the equity of the bill. The appellants declining to further defend, the temporary injunction was made permanent. From that decree this appeal is prosecuted.

The situation out of which the questions for decision arise, shortly stated, is this:

The railroad companies held by the Interstate Commerce Commission to have discriminated in favor of Arbuckle Brothers and

[2] See United States *v.* Chicago, I. & L. R. Co. (1908), 163 Fed. 114; State *v.* Union P. R. R. Co. (1910), 87 Neb. 29.

[1] The arguments of counsel and part of the opinion are omitted.— ED.

against the Federal Sugar Refining Company are interstate trunk lines whose freight rail terminals are at the New Jersey shore of the harbor of New York. Transportation of freights into and out of the city of New York is practicable only by means of car floats, barges, and steam lighters, operating between the city and the New Jersey shore.

To meet this condition the appellee railroads have long held themselves out as extending transportation of freights bound east to a defined area along the river front of the city, and as beginning such transportation westbound when freight is delivered at designated points within the same area. The necessary lighterage service is performed without additional cost or charge, the flat rate into or out from such points being identical with that applicable at the New Jersey rail terminals. The limits within which such lighterage service is performed as a part of the transportation assumed have long been defined and published in the several filed rate sheets of the carriers. The district embraces substantially the commercial and manufacturing river front of Greater New York, and within it the railroads hold themselves out as undertaking to receive or deliver freight at any public dock, or at any accessible private dock where the shipper shall arrange for the use of the dock. Within this lighterage zone each of the appellees has established and long maintained public freight terminal stations, at which it will deliver eastbound freights and receive freights bound west. Some of these stations are owned or managed solely by one of the railroads, and some are union stations operated for the joint use of two or all of the railroads. Some of them are operated by third persons, who manage and operate them under contracts as agents for one or more of the railroads. But whether operated under contract or directly by the company or companies using them, they are represented to be public delivery and receiving stations, and are so set out in the filed tariff sheets of the companies interested.

The "allowance" to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street terminal, and for the lighterage of all freight between that station and the railroad terminals on the New Jersey shore. Arbuckle Brothers, a copartnership, are large refiners of sugar and dealers in coffee. Much of their product of sugar finds a market in the west at points upon the lines of the railroads here involved. Their refinery is upon the water front of Brooklyn. They also own a contiguous property fronting upon

East River some 1,200 feet. Upon this property they have erected a dock, piers, and large warehouses for the receipt of freight intended for transportation to the railroad terminals on the New Jersey shore, or received from such terminals for consignees nearby. They also own steam lighters, car floats, barges, etc., constructed for the transfer of cars, loaded or unloaded, between this dock and the New Jersey terminals. The premises were peculiarly adapted for use as a public union freight station, and for the purpose of extending transportation by their several lines to this portion of the commercial and manufacturing water front of Greater New York, the appellee railroad companies, in 1906, entered into separate, but identical, contracts with Arbuckle Brothers, the latter contracting under the business name and style of "The Terminal Company." The contracts are too lengthy to be set out. Their essential points may be thus summarized:

1. The Terminal Company agrees to maintain the premises in good order and condition for the receipt of freight, and to provide all necessary boats, car floats, docks, and piers, adequate at all times to receive, discharge, transfer, and deliver freights, loaded and unloaded, adequate to accommodate the business contemplated.

2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station, and safely convey the same to the premises, and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies, and carry and deliver the same to said railroad company's New Jersey rail terminals.

3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad at 4⅛ cents per hundred pounds on freight originating at or destined to points west of what is called "trunk line territory," and on freight originating at or destined to points east thereof, 3 cents per hundred pounds.

Under these contracts, consignments to or by Arbuckle Brothers are handled in the same manner as the shipments of the general public, and comprise a part of the tonnage in and out of that station by which the compensation paid to the Terminal Company is measured. This fact was the basis of the complaint made by the Federal Sugar Refining Company, whose sugar seeks the same market, and who claimed that as it lightered its sugar from its own shipping dock to the terminals at the New Jersey shore, the so-called "allowance" made in respect to the sugar of Arbuckle

Brothers, handled under the contracts referred to above, was an unjust and an illegal discrimination unless a like allowance was made to it.

The order of the Commission does not forbid the allowance to Arbuckle Brothers as in itself illegal or unreasonable, but forbids it only as a discrimination unless a like allowance is made to the Federal Sugar Refining Company. That there is no undue discrimination against the Federal Sugar Refining Company in refusing to make a like allowance to it will appear when the conceded circumstances and conditions are considered. This latter company is a competitor of Arbuckle Brothers in the sale and shipment of sugar to the same markets. Its refinery is located at Yonkers on the Hudson river, a point some 10 miles beyond the limits of the free lighterage district. It owns its docks and piers upon the river, but has never enjoyed the free lighterage privilege accorded to all shippers from docks and piers inside the free zone under the tariff sheets of the carriers. It has therefore been compelled to furnish its own means for lightering shipments from its docks to the New Jersey shore. This is an undoubted disadvantage in competing with Arbuckle Brothers, as well as with all other refiners and shippers of sugar within the lighterage district.

Assuming, then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience, for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street terminal are accessorial, or services in aid of railroad transportation, for which they may be paid a reasonable compensation without discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners, and not by virtue of a fee-simple title or a lease, is of no legal significance. Railroad Commission *v.* Louisville & N. R. Co. 10 Inters. Com. Rep. 175; Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co. 11 Inter. Com. Rep. 277.

We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect of their own westbound shipments of sugar, and the compensation paid to them in respect to the freight

handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter, but do find that the compensation paid for the former is an undue discrimination unless a like compensation is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se* in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. Penn. Ref. Co. *v.* Western New York & P. R. Co. 208 U. S. 208, 218.

But, as has already been shown, the railroads were under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. Wight *v.* United States, 167 U. S. 512; General Electric Co. *v.* New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Interstate Commerce Commission *v.* Diffenbaugh, 222 U. S. 42, 46. In the case last cited, it is said:

"The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being, that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 551, U. S. Comp. Stat. Supp. 1911, p. 1301). As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

That the compensation of three and four and one-fifth cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by.

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street station was in the railroad companies, and its business in charge of a third person.

We fail to find any error in the decree of the Commerce Court holding the order of the Commission void, and its decree is accordingly approved.

CHAPTER VI.

DUTY TO FURNISH ADEQUATE FACILITIES.

JACKSON *v.* VIRGINIA HOT SPRINGS CO.

209 Fed. 979. 1913.[1]

McDOWELL, District Judge. This is an action of trespass on the case against an innkeeper, brought by a proposing guest who was refused accommodation. The original declaration was demurred to for several reasons, but it has become unnecessary to discuss any of the grounds of demurrer except the failure of the pleader to allege that the defendant at the time in question had room for the plaintiff.

The general rule in common-law pleading is that it is not necessary to state matter which would come more properly from the other side. Heard's Stephen Pl. (9th Am. Ed.) p. 349. It is also not necessary and, as a rule, is improper, to anticipate and deny or avoid matter of defense. 31 Cyc. 109. But it is necessary to allege at least a prima facie case. Heard's Stephen Pl., p. 351 [352].

The duty of the innkeeper to furnish lodging does not exist if his accommodations are exhausted. In 2 Chitty Pl. (16th Am. Ed.) p. 531, it is said:

"An innkeeper is bound by the custom of the realm to receive travelers and guests at all hours and times if they tender and are ready to pay the customary charge, are in a fit and proper condition as to conduct and health, and if there is accommodation for them."

In Justice Harlan's dissent in the Civil Rights Cases, 109 U. S. 40, 3 Sup. Ct. 43, 27 L. Ed. 835, the following is quoted:

"An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation. . . ." Story, Bailments, §§ 475, 476.

And again:

"In Rex *v.* Ivens, 7 Carr. & P. 213, 32 E. C. L. 495, the court speaking by Mr. Justice Coleridge, said: 'An indictment lies against an innkeeper who refuses to receive a guest, he having at

[1] Part of the opinion is omitted.— ED.

the time room in his house; and either the price of the guest's entertainment being tendered to him or such circumstances occurring as will dispense with that tender.' "

In 16 Am. & Eng. Ency. (2d Ed.) p. 525, it is said:

" If an innkeeper improperly refuses to receive and entertain any person coming to the inn as a guest, he is liable, in consequence of such unlawful act, to an action by the injured party for damages."

In 22 Cyc. 1074, it is said:

" An innkeeper, as one carrying on a public employment, is obliged to receive all travelers who properly apply to be admitted, provided he has room and they pay his reasonable charges."

And quotations of this same purport could be added almost indefinitely.

The only forms for pleading in such cases that I know of are found in 2 Wharton's Precedents of Indictments, 911, and in Hawthorn *v.* Hammond, 1 Carrington & Kirwan, 404, 47 E. C. L. 403, which is cited by Chitty (2 Pl. [16th Am. Ed.] p. 533) as a precedent. In the indictment, as in the declaration in case, it is alleged that there was at the time sufficient room in the inn. As the duty to receive the guest does not exist unless there is room, I do not see that a prima facie cause of action is alleged unless the declaration contains an allegation that the defendant had room for the plaintiff. It is argued that the facts in this respect lie peculiarly within the knowledge of the innkeeper, and that therefore exhaustion of accommodation should be regarded as a matter of defense. This argument is making use of a mere (occasional) rule of evidence to overcome a rule of pleading. Prof. Thayer says that no one has a right to look to the law of evidence to determine the rules of pleading. Thayer's Prelim. Treatise on Evidence, p. 371.

This ground of demurrer must be held good as to this count, and also as to all the remaining counts of the declaration.[2]

DE WOLF *v.* FORD.

193 N. Y. 397. 1908.[1]

WERNER, J. For centuries it has been settled in all jurisdictions where the common law prevails that the business of an

[2] " I think a person who comes to the inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full, and I think that the landlord has no obligation to receive him." Brown *v.* Brand [1902], 1 K. B. 696.

[1] Only an extract from the opinion is here reprinted.— ED.

innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities. Except as the general rule of the common law is modified by statutory enactment, an innkeeper has the undoubted right to conduct his inn as he deems best, so long as he does not violate the law. Although he impliedly invites the public to his establishment, he is bound to furnish no particular kind of entertainment or accommodation, except such as may be expressly stipulated for, or such as may be reasonably implied from the prices which he charges, or the grade of the inn which he maintains. And while he is bound to accept as guests all proper persons, so long as he has room for them, he is under no legal obligation to assign a guest to any particular apartment. Fell *v.* Knight, 8 M. & W. 269. From the very nature of the business it is inevitable that an innkeeper must, at all reasonable times and for all proper purposes, have the right of access to and control over every part of his inn, even though separate parts thereof may be occupied by guests for hire. Over against these general rights and privileges there is the well-recognized responsibility of the innkeeper for the guest's goods and chattels brought to the inn. As to these the innkeeper is an insurer unless his common-law duty is modified by statute, and he is liable for all loss except such as is occasioned by the negligence or fraud of the guest, or by the act of God or the public enemy. Hulett *v.* Swift, 33 N. Y., 571, 88 Am. Dec. 405. Although this liability of the innkeeper for the loss of goods intrusted to him by his guest was clearly defined nearly four centuries ago, it has been reserved for us at this late day, in the development of our jurisprudence, to define, with such accuracy as the nature of this case requires, the relation of the innkeeper to the person of his guest. It is clearly not the conventional relation of landlord and tenant, for there is no contract as to the realty. Taylor's L. & T. § 66. A room in an inn occupied by a guest is not, in the legal sense, his dwelling house, for notwithstanding his occupancy, it is the house of the innkeeper. Rogers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548. Nor is the relation of innkeeper and guest usually created by express contract, for as a rule it is based wholly upon the mere circumstance that one man happens to have an inn which is patronized by another, and the law implies whatever else is necessary to constitute the relation between them. Anthon's Law Student, p. 57; Willard *v.* Reinhardt, 2 E. D. Smith, 148. It is a relation, moreover, which cannot be defined with exactitude in matters of detail, for it may be one thing in a mining camp, or in the remote and sparsely settled portions of a country. It may be another thing in the tavern by the rural wayside, and yet another

in the modern urban palace called a hotel. Between the extreme of rugged simplicity on the one hand and of palatial magnificence on the other, there are numberless gradations of service, attention, convenience, and luxury which must necessarily give the relation of innkeeper and guest such flexibility as will render it adaptable to varying conditions and circumstances. But underneath all these differing conditions there is, of course, a basic legal principle which governs the general relation of innkeeper and guest. The innkeeper holds himself out as able and willing to entertain guests for hire; and, in the absence of a specific contract, the law implies that he will furnish such entertainment as the character of his inn and reasonable attention to the convenience and comfort of his guests will afford.

HERVEY *v.* HART.

149 Ala. 604. 1906.[1]

HARALSON, J. In Doyle *v.* Walker, 26 U. C. J. B. 502, it was held, as the common law on the subject, that the innkeeper has the right and the sole right to select the apartment for a guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodation, he is liable to an action for damages. 16 Am. & Eng. Ency. Law (2d Ed.) 524, 525.

The plaintiff in this case, the appellee here, sued the defendants, who are appellants, to recover damages for the alleged reason that he was put out of the room to which he had been assigned by defendants in their hotel, and was refused proper accommodations in said hotel. The jury found for defendants, and the court, on motion of the plaintiff, set aside the verdict and granted a new trial. The grounds of the motion were: "1. Because the verdict was not supported by the evidence, as applied to the law as charged by the court. 2. Because the jury in rendition of the verdict, ignored the law as charged by the court. 3. Because the verdict is not supported by the evidence."

The well established rule in this court, as to granting new trials is, "that this court will not revise a judgment granting the motion, unless the evidence plainly and palpably supports the verdict." Merrill *v.* Brantley, 133 Ala. 537, 31 South. 847; Smith *v.* Tombigbee R. R. Co., 141 Ala. 332, 37 South. 389.

[1] The statement of facts, arguments of counsel and part of the opinion are omitted.— ED.

The theory of the plaintiff relied on for a recovery is clearly stated in the complaint, upon which, issue being taken, the case was tried. The plaintiff's evidence tended to support the complaint, but the evidence of the defendants was not entirely consonant therewith. In some of its more important phases, it conflicted, and different inferences might have been well drawn therefrom. It would be useless to review the evidence on each side, to do which would require time and labor. We have carefully read the evidence in consultation, and conclude that while it might justify, yet it does not "plainly and palpably support the verdict," without which condition, we cannot consistently with the rule of the court above announced reverse the judgment granting the motion for a new trial.

Under the averments of the complaint, the defendant was not liable, if he offered plaintiff proper accommodations in lieu of the room previously assigned to him.

The ruling on the motion for a new trial must be affirmed.[2]

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

OCEAN STEAMSHIP CO. OF SAVANNAH *v.* SAVANNAH LOCOMOTIVE WORKS AND SUPPLY CO.

131 Ga. 831. 1909.[1]

EVANS, P. J. At common law a carrier's duty to receive goods was limited to his facilities for transportation. The owner of a single ship may hold himself out to the public to carry certain goods for hire. As to the goods he proposes to carry, he is a public carrier; but he is under no obligation to provide other ships because his vessel is inadequate to transport all goods which may be offered him. Such a carrier does not owe to the public all the duties imposed by the law on railroad companies and similar public institutions to furnish adequate transportation facilities for all goods which may be tendered. Railroad companies are public institutions, and are granted certain exclusive franchises and rights which naturally impose correlative duties. They are invested with the power of condemnation, by the exercise of which sovereign right they acquire an exclusive privilege to carry on their business over the highway constructed by them. They are endowed with special and unusual powers, with an express view to their

[2] Compare Mann Boudoir Car Co. *v.* Dupré (1893), 54 Fed. 646, and Pullman Palace Car Co. *v.* Taylor (1879), 65 Ind. 153.

[1] Only an extract from the opinion is here reprinted.— ED.

rendering to the public adequate service. The conference of these unusual powers raises an obligation, not only to serve the public impartially, but to serve the public efficiently. Upon them the law imposes the obligation to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage; and they are bound to provide sufficient cars for transporting, without unreasonable delay, the usual and ordinary quantity of freight offered to them, or which might reasonably and ordinarily be expected. 5 Am. & Eng. Enc. L. (2d Ed.) 167. A navigation company like the defendant, which receives no franchise from the state to use the open sea, and which enjoys no monopoly or right of eminent domain, owes no duty to the public to furnish adequate facilities to transport all of the traffic of the ports of its termini. It is under no obligation to buy other ships because it does not undertake to carry any more goods than its vessels will safely accommodate. If there is a demand for more ships, the commercial necessities will regulate the deficiency in transportation service, either by voluntary enlargement of the facilities of existing ship lines or the establishment of new ones.

A carrier, not a public or quasi public institution, may select the class of goods which he proposes to carry. Whether the right of selection may include the right to limit the quantity of any commodity he proposes to carry, provided he gives notice of the limitation, is not before us.

WHITEHOUSE *v.* STATEN ISLAND WATER CO.

101 N. Y. App. Div. 112. 1905.[1]

HOOKER, J. The principal question presented by the record for the consideration of the court is whether, under the contract existing between the parties to this action, the defendant's failure to supply water to the plaintiff during a considerable portion of the month of January and part of the month of February, 1904, was a breach of that contract, for which the plaintiff is entitled to recover as damages the fair value of services rendered to the plaintiff in pumping water from his cistern for his use. The defendant is a quasi public corporation, chartered to supply water to citizens of what was formerly New Brighton. When the plaintiff moved into his present residence, connection had been made between that residence and the defendant's main in St. Mark's Place by means of a service pipe, and, upon the plaintiff's taking up

[1] Part of the opinion is omitted.— ED.

his residence there, he paid to the defendant the sum of money it asked each year for the supply of water which he proposed to use. The rate was readjusted after he had lived there a short time, for the reason that he thought he was paying a larger rate than the regulations of the defendant called for. One of the defendant's agents, upon the basis of the established rates, took an inventory of what the plaintiff was using, and readjusted the rate. This rate was paid for many years, and on or about the 1st day of May, 1903, the plaintiff again paid to the defendant, and the latter received, the annual rental. Under these circumstances, a contract is implied between the plaintiff and the defendant corporation, by virtue of which it undertakes to supply him with water. McEntee *v.* Kingston Water Co., 165 N. Y. 27, 58 N. E. 785. There must necessarily be implied in this contract a provision that the supply by the defendant for which the plaintiff is paying shall be sufficient for the ordinary uses to which the plaintiff has put it. It is unquestioned that there has been a breach of that contract, and the measure of damages adopted by the plaintiff is not, nor could it well be, questioned. The defendant sought to escape liability on the theory that the contract with the plaintiff was simply to supply water at the junction of the service pipe and the water main in St. Mark's Place, and that because the plaintiff's residence was on an eminence, and at an altitude considerably above other premises supplied from the St. Mark's main, it was not liable, provided it could show that water could have been obtained from the junction of the main and the service pipe. Such was not the contract between the parties. Were such provision properly to be incorporated into an implied contract between water companies and consumers, it would, at the option of the water company, relieve it from all liability for its failure to force water into the houses of its consumers, by showing that water could have been obtained in the street below ground in the water mains. The implied contract in this case was to supply the plaintiff with water, no matter what the altitude of his house was above the water main, for this had been the custom for many years, and the defendant had been paid the rates demanded for supplying water at the house; and again, in continuance of the contract, on the 1st day of May, 1903, the defendant accepted payment of the full rate for the ensuing year, which implied a contract to continue the service as it had been rendered, and that was that the plaintiff should have water in his house.[2]

[2] See City of Jackson *v.* Anderson (1910), 97 Miss. 1.

LEAVELL *v.* WESTERN UNION TELEGRAPH CO.

116 N. C. 211. 1895.[1]

THIS was a complaint, heard before the Railroad Commission, in Raleigh, on the 13th November, 1894.

The complaint was filed August 21, 1894, alleging a violation of the tariff rate prescribed by the Commission for the transmission of telegraphic messages.

The plaintiff alleged that on August 17, 1894, he delivered a ten-word message to the defendant, at Wilson, N. C., to be transmitted to Edenton, N. C., and was required by the defendant to pay fifty cents for the transmission of the message, and that this was a violation of the rate prescribed by the Railroad Commission of North Carolina.

The defendant answered the complaint on the 31st of August, 1894, through its General Superintendent, J. B. Tree, alleging that the "telegraphic tolls from Wilson, N. C., to Norfolk, Va., are twenty-five cents for ten words, and the rate from Norfolk, Va., to Edenton, N. C., is twenty-five cents, making a total of fifty cents. The message was sent *via* Norfolk because it is the only telegraph route by which the business addressed to Edenton can be handled and turned over to the Elizabeth City and Norfolk Telegraph Company, at Norfolk, Va., as the Western Union Telegraph Company has no commercial office at Edenton, N. C."

CLARK, J. In Express Co. v. Railroad, 111 N. C., 463, this Court affirmed the constitutionality of the act (Ch. 320, Acts 1891) establishing the Railroad and Telegraph Commission. In Mayo *v.* Telegraph Co., 112 N. C., 343, it sustained the power of such Commission under Section 26 of said act, to establish rates for telegraph companies. In Railroad Commission *v.* Telegraph Co. (Albea's case), 113 N. C., 213, the Court held that telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by FULLER, C. J., in Railroad *v.* Pennsylvania, 145 U. S., 192. To the same purport, Campbell *v.* Railroad, 86 Iowa, 587.

In the present case the commission find as a fact that "the defendant has a continuous line by which messages may be transmitted from Wilson to Edenton and other adjacent points in North Caro-

[1] Part of the statement of facts and part of the opinion are omitted.— ED.

lina, but this line traverses a part of the state of Virginia, passing through the city of Norfolk;" and it properly holds upon the evidence " that the telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that as the defendant could have sent the message the whole distance over its own line, it cannot be heard to say that it did not do what it ought to have done and thus collect 50 cents for the message instead of 25 as allowed by the commission tariff. The defence set up that in fact it only carried the message to Norfolk and then paid another company to forward it to Edenton can not be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient it is the duty of the company to add another wire or an additional employee. It is not a mere private business but a public duty which the defendants by their franchise are authorized to discharge. It is further to be noted that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville and Hertford on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer and against the public at large, as was intimated in Albea's case, *supra,* 113 N. C., on page 226.

It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot substract itself from obedience to the rates prescribed by the authority of the State, acting through the Commission, by a contract giving one customer, the railroad, preference in business and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common knowledge does not exceed ten dollars per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the Commission was established

to prevent. In Albea's case, *supra,* no commercial message was tendered, and the point now decided was not presented by the record. The ruling of the Commission is in all respects.

Affirmed.[2]

LAWRENCE *v.* RICHARDS.

111 Me. 95. 1913.[1]

SAVAGE, C. J. This is a mandamus proceeding brought against the defendants as trustees of the Gardiner Water District, wherein it is sought to compel the defendants to extend the water mains of the District to the petitioner's residence in South Gardiner, and supply him with water. The cause was brought before a single Justice who denied the peremptory writ, and it comes before us on exceptions to that ruling.

The Gardiner Water District is a quasi-municipal corporation, created by chapter 82 of the Private and Special Laws of 1903. It is about six miles long northerly and southerly and about one and five-eighths wide on the average. Territorially it includes only a part of the city of Gardiner, but it does include the village of South Gardiner, in which the petitioner's house is situated. The primary object of the charter was to enable the District to acquire the ownership of the existing water system of the Maine Water Company in Gardiner, Pittston, Randolph and Farmingdale, by condemnation or otherwise. For, although power was granted to it to take and hold water of the Cobbosseecontee river, and to take land for dams, reservoirs and so forth, yet section 13 of the Act provided that this grant of power should be inoperative unless the District should first acquire the plant and franchises of the Maine Water Company. At the time the charter was granted, and at the time the District acquired the plant of the Maine Water Company, its system was extended only through the more congested and thickly settled portions of the city of Gardiner, and not into the outlying parts of the District. The area of service lay mostly within a circle one mile in diameter. It did not then extend to South Gardiner, which is about five miles from the city proper. Nor has it since been extended in the direction of South Gardiner more than a few hundred feet.

It is well settled that mandamus does not lie to compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer, board or commission at whose

[2] See Cumberland T. & T. Co. *v.* Kelly (1908), 160 Fed. 316.

[1] Only part of the opinion is reprinted.— ED.

hands performance is desired. The court may under proper circumstances require an inferior tribunal to exercise its discretion, but not prescribe how it shall exercise it. The domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the court. The court cannot substitute its own judgment for that of the tribunal to which it was committed by law. Bangor *v.* County Commissioners, 87 Maine, 294; Spelling on Extraordinary Remedies, sections 687, 1384. This principle is admitted in argument by the petitioner.

But the petitioner contends that the trustees have no discretion in the matter, and that, by force of the original act of 1903, he has a clear, legal and vested right, even a contract right, to have water supplied at his house,— a right which the Legislature could not impair by the amendment of 1905. He bases his contention on the ground that the District is bound to supply every inhabitant of the District with water. If this contention has real merit, the consequence is that the trustees, acting for the District, are legally bound to supply water to all inhabitants, no matter how large the cost of the undertaking, nor how small the revenue, and no matter how ruinous and destructive the result might be to the financial ability of the District to carry on its operations. That this contention is not sound is, we think, easily demonstrable. The area of the District outside of the city proper and South Gardiner is scatteringly settled. The elevation in some places is considerably higher than the system's reservoir. It does not need the testimony of expert engineers to satisfy a reasoning mind that under such conditions the expense necessarily to be incurred in performing the duty, as it is claimed to be, of supplying every inhabitant of the District with water would practically be destructive of the purpose of the charter. It would create a burden too heavy to be borne. Did the Legislature contemplate and intend such a possible result? Did the Legislature intend, when it empowered the cities of Lewiston and Bangor to own their water systems, with powers and duties with respect to the water supply similar to those of the Gardiner Water District, that those cities were bound to furnish water over the entire extent of their territorial areas? We do not think so. It is a matter of common knowledge that water systems in towns or cities containing both an urban and a rural population, whether the systems be owned privately or municipally, never have been in fact, and are not now, anywhere, extended beyond the more compact parts of the town into and through the rural parts. It is practicable in the rural parts for inhabitants to supply themselves. In the thickly settled parts it gradually becomes inconvenient, impracticable and sometimes impossible for the in-

habitants to do so. Sources of supply become exhausted or defiled, and the need for more water, which the inhabitant cannot well furnish for himself, becomes imperative. Organized action, either public or private, becomes necessary, and the individual then pays for a service which he can no longer perform for himself.

We think then there was nothing in the situation existing in Gardiner which gives color to the contention that the Legislature intended the district to be bound to supply all the inhabitants within its limits with water, or to operate and extend the system beyond the ordinary limits to which similar systems are operated and extended. The system which the district was authorized to acquire was limited in Gardiner in fact to the urban portion of the city. This system the trustees were empowered to extend and improve, but we do not think that the statute thereby required them to extend to all parts of the district, to the parts which did not need the water as well as to those which did; even, if the petitioner's theory is correct, to extend to the individual who might reside in the remotest rural portion of the town, if he demanded it. To place such a construction upon the statute, which alone imposed duties upon the trustees, seems unreasonable, and there is nothing in the language of the statute which requires such a construction. In fact there is an implication otherwise in the statute. By section 10 it was provided that the water rates established by the trustees should be such as to provide revenue " . . . for such extensions and renewals as may become necessary." This clearly does not mean extensions all over the district.

We think then that the contention that as a matter of law every individual in the district has the right to have the water brought to him cannot be sustained. But if the district is not in law bound to supply all, who is to determine to what extent the system shall be extended, and who shall thereby be supplied? The power to do this must necessarily be vested in the trustees. It is not given to any other person or body. In making the determination they must use their judgment and exercise their discretion, and the exercise of that discretion is not reviewable on mandamus.

It is true that the situation of the petitioner in the village of South Gardiner may not be the same as that of the farmer in the rural part of the town with his spring, or well, or brook. But once grant, as we must, that the trustees are vested with a discretion not to extend to every part of the district, it follows that some power must decide the limits of extension. There is no dividing line in the exercise of the discretion. There is no ground for saying that the trustees have discretion as to part of the dis-

trict, and have none as to another part. They must have discretion as to all extensions or none. If they abuse their discretion, the remedy does not lie in the power of the court, but in the wisdom of the Legislature.

It follows from what we have said that the petitioner has no vested legal right, whether it be in the nature of contract or otherwise, to have the district's water main extended to his house. His only legal right is that the trustees shall exercise their discretion. That they have done, adversely to the petitioner.

It is proper to say that the case of Robbins *v.* Railway Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963, on which the petitioner strongly relies, is easily distinguishable from this case. There the main was already extended by the petitioner's house, and mandamus was granted to compel the defendant to permit water to be conducted from the main to the house. There was no question of extending a main, nor was the defendant in that case vested with any such discretion as we think these defendants are. The court in that case held that a public service corporation was bound to serve all impartially, fairly, and without discrimination, but it did not hold that such a corporation authorized to supply water to the public was bound at all hazards, without regard to expense or revenue, or the exercise of good business judgment, to extend its mains to every individual of the public who might demand it. But what the duties of a public service corporation may be in a particular case are not involved in this case, and we do not need to consider them now.

It is unnecessary to consider the other questions raised. Our conclusion is that the Gardiner Water District is a municipal corporation created for a special purpose, that its trustees are vested with discretionary powers in the matter of extensions of the system, and that the court cannot interfere with the exercise of their discretion.

Exceptions overruled.

CENTRAL UNION TELEPHONE CO. *v.* STATE.

118 Ind. 194. 1888.[1]

OLDS, J. This is an action, brought by the relatrix, to compel the appellant, by mandate, to furnish her, at her place of business in the city of Lafayette, a telephone and telephonic connections and facilities.

[1] Part of the opinion is omitted.— ED.

This action is brought under the acts of 1885, prescribing the duties of telephone companies, and to regulate the rental to be paid for the use of telephones, and requires a construction of these acts. On April 8th, 1885, the following law was enacted:

"AN ACT prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency."

SECTION 1. Relates exclusively to telegraph companies.

"SEC. 2. Every telephone company, with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone company's business, supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose."

On the 13th of April, 1885, another law was enacted, which is as follows:

"AN ACT to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation."

It is insisted by appellant that the act of April 8th is simply an act prohibiting discriminations by telephone companies, and providing a penalty for any discrimination by such companies, and that the act of April 13th prescribes the price which may be charged for the rental of telephones, when the same are rented, and prescribes penalties for asking or taking a greater rental, and that unless they inhibit all other systems or methods of telephony, other than the rental, this case was decided wrongly by the court below; and that the title to the act of April 8th declares it to be an act prohibiting discrimination between patrons, and prescribing penalties therefor.

It is further claimed by appellant that the answers show that appellant was not engaged in a general telephone business at Lafayette at the time of appellee's demand, but was engaged only in a limited business, and that it offered to furnish appellees such

limited service, and has in all respects offered to treat her in the same manner as it was treating its other patrons, but that she wanted a different service than that in which appellant was engaged; in other words, she wanted appellant to discriminate in her favor, and to grant her demand would make appellant amenable to the law against discrimination.

In determining this case it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the Legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others, who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists, to send, receive and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron, unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "An instrument for conveying sound to a great distance."

To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities and service to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the cases of State *v.* Nebraska Telephone Co., 17 Neb. 126; Vincent *v.* Chicago, etc., R. R. Co., 49 Ill. 33; People *v.* Manhattan Gas Light Co., 45 Barb. 136. And the principle held in these cases is in accordance with the well settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the Legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities and service; and even if it were controverted, it is well settled by authorities that the Legislature has the right to do so, relative to the business conducted within the State. Hockett *v.* State, 105 Ind. 250, and Central U. Tel. Co. *v.* Bradbury, *supra,* and authorities cited in those cases; Johnson *v.* State, 113 Ind. 143; Munn *v.* Illinois, 94 U. S. 113; Ouachita Packet Co. *v.* Aiken, 121 U. S. 144; Patterson *v.* Kentucky, 97 U. S. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8th, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the Legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telephone company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation; or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the Legislature that where a telephone company was doing a general telephone business in this State, any person within the local limits of its business in a town

or city should have the right to demand and receive a telephone and telephonic connections, facilities and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the State. The Legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual, and gave him the right, to demand and receive such service within the limits of the company's business, in any town or city where such company is doing a general telephone business.

GALENA AND CHICAGO UNION RAILROAD CO. *v.* RAE.

18 Ill. 488. 1857.[1]

SKINNER, J. This was an action on the *case* against the railroad company, as common carriers, for refusal to carry, and for delay in carrying, the grain of the plaintiff below from Rockford to Chicago. The cause was tried by jury, who returned a verdict of $4,950 against the company, upon which the court rendered judgment, refusing to grant a new trial.

The evidence is very voluminous, and, in the opinion of the court, is insufficient to sustain a verdict for the amount found.

The instructions in the record, and involved in the assignments of error, are seventeen in number, and a critical examination of each in our opinion would embrace almost the entire law relating to common carriers. This court is under no obligation to write a treatise upon this branch of the law, nor was the court below bound to act upon instructions not necessary to enlighten the jury of the law arising upon the evidence properly before them.

As the cause will be again for trial, we will state those rules of law in controversy which are material to the case made by the record.

The evidence shows that the company had the necessary means and facilities for transporting with dispatch the amount of freight ordinarily for carriage, and that at the period when the wrong is charged to have been committed there was an unusual and extraordinary quantity of grain for shipment, owing to the great harvest of that year and want of facilities for storage in the country. In this respect the company was not in default, in regard to that duty it owed the public, of affording reasonable facilities for the trans-

[1] Part of the opinion is omitted.— ED.

portation of freight. Neither the common law nor the statute requires anything more than that the company shall furnish reasonable and ordinary facilities of transportation — such as are adapted to its mode of conveyance, and will meet the ordinary demands of the public. The company was not bound to provide in advance for or anticipate extraordinary occasions, or an unusual influx of freight to the road. Wibert *v.* New York & Erie Railroad Company, 19 Barbour's S. R. 36; Statutes 1856, p. 1070.

Corporations for carrying are created for the public good, and powers and privileges are given them in consideration of the benefits they are expected to confer upon the public. Their obligations to the public require the use of their facilities fairly, and in such manner as is best calculated, in the prosecution of their business, to afford the largest public benefit. An honest and fair endeavor, in the course of their legitimate enterprise, to accomplish this is all that can be legally required of them.

There is no proof in the case that the grain was lost or damaged by being detained at Rockford, and the jury, probably, based their verdict upon the hypothesis that the company was bound to be ready, at all events, to carry whatever amount of freight was for transportation, and when required.

Judgment reversed and cause remanded.

Judgment reversed.[2]

ILLINOIS CENTRAL RAILROAD CO. *v.* RIVER AND RAIL COAL AND COKE CO.

150 Ky. 489. 1912.[1]

CARROLL, J. The River & Rail Coal & Coke Company is a corporation engaged in mining coal in Union county, and its mine is located on a line of railway controlled and operated by the appellant railroad company. This suit was brought by the coal company to recover damages for the failure of the railroad company to furnish it cars for the transportation of coal produced at its mine. It was averred in the petition that on several named days in October, 1910, the railroad company failed to furnish it any cars in which to load coal, although the railroad company was given timely and sufficient notice of the number of cars that would be needed on those days. It was further averred that by reason of the failure to furnish the cars ordered, or any cars, on the days mentioned, operations at the mine had to be suspended, thereby

[2] See Yazoo & M. V. R. R. Co. *v.* Blum (1906), 89 Miss. 242.

[1] Part of the opinion is omitted.— ED.

incurring considerable expense in the payment of unemployed labor and causing the coal company to suffer loss in other respects that are pointed out more in detail in the instructions that will be later noticed, for all of which it sought to recover damages. The case for the coal company is not put upon the ground that the railroad company in failing to furnish it cars was discriminating against it or showing a preference to other coal mines or shippers; but the right of recovery is rested upon the ground that the railroad company did not have a legally adequate or sufficient number of coal cars to supply the demands of the trade, and in so failing committed a breach of duty for which it was amenable in damages.

In its defense the railroad company did not deny that it failed to furnish the cars, or dispute that reasonable and proper demand for them had been made, but sought to excuse its failure upon the ground that, although it had an adequate supply of coal cars, the demand for this class of cars was so great in October, 1910, that it could not furnish the cars requested without discriminating against other coal mines on its line of road and showing a preference to the appellee coal company. Several issues are raised by the pleadings, but the real question in the case is: What is the legal measure of duty that a railroad company owes to the operators of coal mines in respect to furnishing them cars for the transportation of coal?

At common law the carrier was bound to provide reasonable facilities and appliances to transport such goods as it held itself out ready to carry. Newport News Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301, 16 Ky. Law Rep. 555; L. & N. R. R. Co. *v.* Queen City Coal Co., 99 Ky. 217, 35 S. W. 626, 18 Ky. Law Rep. 126. And this common-law duty has been incorporated into both the state and federal statutes. Thus section 783 of the Kentucky Statutes, which treats of the duties of railroad companies in furnishing adequate facilities for the transportation of freight, provides that "every company shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at places established by the corporation for receiving and discharging passengers and freight." In section 1 of the act of Congress relating to interstate commerce it is provided that "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage. . . . And it shall be the duty of every carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and adjust reasonable rates applicable thereto."

It will thus be seen that under the common law, as well as the state and federal statutes, which are merely declaratory thereof, a common carrier is under a legal duty, subject to exceptions some of which will be noticed, not only to provide itself with but to furnish to shippers, when seasonably requested, sufficient cars and equipment to carry all of the freight that may be offered to it and that it holds itself out as a carrier of. Or, as admirably stated in Hutchinson on Carriers, § 495: "The first duty of the common carrier who holds himself out to the public as ready to engage in the carrying business is, of course, to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry. He must put himself in a situation to be at least able to transport an amount of freight of the kind which he proposes to carry equal to that which may be ordinarily expected to seek transportation upon his route, for, while the law will sometimes excuse him for delay in the transportation and even for a refusal to accept the goods which may be offered for carriage when there occurs an unprecedented and unexpected press of business, it will not do so when his failure or refusal results from his not having provided himself with the means of present transportation for all who may apply in the regular and expected course of business."

The demand was not more than the company should reasonably have anticipated and prepared to meet at the season of the year when this controversy arose. In fact, railroad companies have such ample means of ascertaining, in advance, the number of cars that each mine on the road will need during the year or during the busy season, that it would be a very exceptional state of affairs when they could not anticipate and prepare to meet the demands of the trade. There is, indeed, less probability of an unprecedented and unusual demand for cars arising in the carriage of coal than might occur with respect to other commodities, for with the facilities afforded for rating the capacity of mines and the fact that the quantity of coal to be mined, although gradually increasing, is generally fairly well known in advance, the coal carrying business is perhaps subject to fewer fluctuations than arise, for example, in the transportation of grain, cattle, and cotton. But in view of the fact that the real defense relied on is that the company had a sufficient supply of cars and equipment to meet the demands of the trade, it does not seem necessary that we should notice with further particularity the features of the case relating to the strike or the unusual demand on its equipment. Whether the company had or not such facilities as were legally sufficient depends in a large measure on the soundness of its interpretation

of the measure of its legal duty in providing itself with equipment and furnishing the same to shippers.

The appellant is one of the largest railroad companies in the United States. Its tracks cover thousands of miles and traverse a number of states. On its lines of road in at least three states there are situated many coal mines in active operation, and to handle the coal trade it had, in 1910, supplied itself with some 23,000 coal cars, and it contends that this number of cars was adequate to supply the demand, insisting, however, that the number of cars required to fulfill its duty did not impose upon it the obligation to have on hand the number needed to meet the full demands of the trade during the fall and winter months when the movement of coal is many times larger than it is in the spring and summer months. In other words, as we understand the position taken by counsel, it is this: That if a railroad company has a sufficient supply of cars to meet the demands of the coal carrying trade during the year, assuming that approximately the same amount of coal will be shipped during each month, it has fulfilled its legal duty, although the car supply may be wholly inadequate to meet the demands of the trade during the winter and fall months. But we do not agree with counsel that this is a fair or reasonable interpretation of the legal duty of a railroad company engaged in the coal carrying trade from mines along its line of road; for, although a railroad company might maintain a sufficient number of cars to carry the coal offered, if the same quantity approximately was offered each month in the year, it might fall far short of having a sufficient number to meet the demands of the trade during the fall and winter, because during this season for at least six months many more cars are needed than are required in the other six months. If the slack as well as the busy months of the year are to be taken into consideration in estimating the equipment needed, the supply of cars might be wholly inadequate during the busy months, and yet there would be a large surplus during the slack months. This difference between the movement of coal in the fall and winter and the spring and summer is a matter of such common and general knowledge that railroad companies will not be allowed to plead ignorance of this well-known condition, or with knowledge of it, to excuse their lack of car facilities upon the ground that if approximately the same quantity of coal was shipped and used each month in the year their car facilities would be ample to meet the demand. Nor does the well-recognized principle that appellee was only required to have a sufficient supply of cars to meet the normal demands of the trade help its defense because it did not have in our opinion such a

supply; for, conceding that a carrier is only required to have a car supply adequate to meet the normal demands of the trade, this normal demand is not to be estimated by the number of cars needed when the normal demand is least, but by the number needed when the normal demand is the heaviest, in respect to a commodity such as coal, the normal demand for which is practically the same during six or eight months in each year. And while the number needed in each of these busy months may be taken into consideration in estimating the number needed to supply the demand during all these months, the number needed to supply the demand during the spring and summer months is entitled to little consideration in determining what number of cars is needed to supply the normal demand. Of course, a railroad company cannot tell with exact certainty the number of cars that may be needed to meet, in the manner indicated, the normal demands of the trade, as unexpected and unforeseen conditions may arise that will make full performance of its duty impracticable and exonerate it from liability for failing to discharge its duty; but it can make a fair estimate of the number needed, based on mine rating and capacity and its experience in handling the traffic, and it must supply itself with and maintain the number needed to meet the average demand of the trade during the months when the trade is heaviest, and no less than this will answer its duty.

This being our view of the law, it is quite clear from the evidence that the railroad company did not have a sufficient supply of cars to meet the normal demand during the busy months for several years, including 1910, although it had many more than were necessary during the spring and summer months, and in failing to have a sufficient supply to fill the normal demand during the fall and winter months it committed a breach of the duty that it owed to the coal company, thereby becoming liable to it in damages.

MERCHANTS DISPATCH AND TRANSPORTATION CO. *v.* CORNFORTH.

3 Colo. 280. 1877.[1]

THATCHER, C. J. The Merchants' Dispatch and Transportation Company is a common carrier. Birks Cornforth, the defendant in error, who was the plaintiff in the court below, through their agents, Raymond Bros., bought a car load of fruits, consisting of oranges, lemons, and bananas, of Underhill & Stewart, in New York city.

[1] Part of the opinion is omitted.— ED.

The fruit was delivered to and shipped by the plaintiff in error, from New York to Denver, in the month of February, A. D. 1874.

There is some evidence that the fruit was packed in a refrigerator car in New York city; such a car, as the testimony establishes, is usually employed in the winter for that purpose, it being well adapted to exclude the cold. The evidence conclusively shows that when the fruit reached Denver, it was in an ordinary box car, and badly frozen. There were apertures in the car through which the cold and snow entered. There was snow all around the boxes of fruit. It appears in evidence, that fruit shipped in a common box car will freeze in ordinary winter weather, and if shipped with due care in a refrigerator, or other car adapted to keep out the cold, it will not freeze in severe winter weather.

Was the company guilty of negligence?

When a common carrier accepts for transportation in the winter season, to ship half across the continent, delicate fruits, the character of his employment, independent of any contract, clearly implies that he will ship them in such cars and exercise such diligence as may be reasonably necessary for their safe passage to their destination. Having failed to do this he cannot escape liability. In the case of Wing *v.* The New York and Erie R. R. Co., 1 Hilt. 241, where by the negligence of the carrier a certain lot of potatoes was frozen, the court says: "The fact that they were perishable imposed upon the defendant more than ordinary care and diligence, as mere bailees, and the obligation to deposit them most securely against cold. That it would take longer to do it does not relieve them of the duty. The intensity of the cold created also the obligation of additional vigilance, and what was usual, was not the consideration. What was necessary to be done, under all the circumstances, was the true criterion."

The rule here adopted, that the degree of care and diligence to be exercised by the carrier must be commensurate with the nature of the trust, is salutary and just.

The company, as appears from the evidence, was guilty of the most culpable negligence in transporting the fruit in a car wholly unfit for the purpose, in the winter season. It follows from what we have before said, that the company is liable for loss occasioned by such negligence.

Let the judgment of the court below be affirmed, with costs.

Affirmed.[2]

[2] See Shea *v.* Chicago R. I. & P. Ry. Co. (1896), 66 Minn. 102; Forrester Co. *v.* Southern Ry. Co. (1908), 147 N. C. 553.
Compare New York P. & N. R. R. Co. *v.* Cromwell (1900), 98 Va. 227, and McConnell *v.* Southern Ry. Co. (1907), 144 N. C. 87.

ROBINSON *v.* CHICAGO AND ALTON RAILROAD CO.

135 Mich. 254. 1903.[1]

ERROR to Circuit Court, Kent County; Alfred Wolcott, Judge.

Action by Samuel Robinson, Jr., administrator of Samuel Robinson, deceased, against the Chicago & Alton Railroad Company and the Pullman Car Company. Judgment for plaintiff against the railroad company, which brings error. Affirmed.

Plaintiff recovered verdict and judgment for damages occasioned by the death of Samuel Robinson, Sr., while a passenger upon a train of the defendant railroad company, through the alleged negligence of said company. The deceased left his home in Charlotte, Mich., July 2d, to attend the Democratic National Convention at Kansas City, Mo. The delegation to the convention from Michigan met in Chicago, having arranged with the defendant railroad company for a special train of sleeping cars to take them from Chicago to Kansas City on the night of July 2d. The train was made up of the engine, baggage car, five sleepers, and a dining car in the rear. The cars for convenience are numbered from the front of the train, 1, 2, 3, 4, and 5. The sleepers were owned by the defendant Pullman Company, the dining car by the defendant railroad company. Mr. Robinson had a railroad ticket, and also a berth ticket in Pullman car No. 3. The train left Chicago at 11 o'clock, an hour late. After getting out of the city, it ran at a high rate of speed. Mr. Robinson and some others went to the dining car for refreshments about midnight, where they remained until after the train left Joliet. They then left the dining car for their respective sleepers, and Mr. Robinson and some others stopped for a short time near the forward end of car No. 4, to converse with friends. One of them passed through the vestibule into car No. 3, followed by Mr. Robinson. Another soon afterwards passed from No. 4 into No. 3, and inquired for Mr. Robinson, desiring to speak with him. He could not be found. The last time he was seen alive was when he passed out of the front door of car No. 4 to cross the vestibule into car No. 3. In doing so he fell from the car and was killed. His dead body was found the next morning lying on the east side of the track near a station named Mazona, lying between the side track and the main track, near a switch which the train had just passed over. The body, after striking the ground, rolled about 30 feet. An investigation showed that the fastenings of the vestibule door, through which Mr. Robinson fell,

[1] Part of the statement of facts and part of the opinion are omitted.— ED.

were defective. The evidence on the part of the plaintiff showed that the slot which held the bar designed to keep the door closed was old and worn, and would not hold the bar in place, and that the spring and latches, also designed to keep the door closed, were broken and defective. There was evidence that the train swayed considerably in its movements, so that the passengers had to be careful to prevent being thrown down in passing through the cars, or from one car to another. The theory of the plaintiff is that Mr. Robinson was thrown through the open door of this vestibule. The Pullman Car Company was made a party as a joint tort feasor. At the close of the evidence the court directed a verdict for the Pullman Company, and left the question of negligence of the defendant railroad company to the jury.

GRANT, J. (after stating the facts). 1. It is urged that the manner in which Mr. Robinson met his death is mere conjecture, and that, therefore, there can be no recovery. This position is untenable. It is a fair inference from the evidence adduced in behalf of the plaintiff that Mr. Robinson was thrown through the vestibule door. He was seen to go out of car No. 4 for car No. 3, which he did not enter. The natural conclusion is that he either voluntarily jumped from the car through this door, or was thrown through it by the lurching of the train. There is nothing to indicate that he intended to commit suicide by jumping from the car.

2. It is next urged that the court erred in directing a verdict for the Pullman Car Company. This is not a question in which the defendant railroad company is interested. The verdict and judgment are not conclusive of the liability of the Pullman Car Company to the railroad company under the contract between them, by which the Pullman Company furnishes its cars to be run over the defendant's road. Private contracts between these two companies do not affect the rights of travelers. Plaintiff has not appealed from the decision against him and in favor of the Pullman Company. The sole question left for the jury was, is the railroad company liable for the defects in the cars furnished by the Pullman Car Company to be used by the railroad company in transporting its passengers? If the defendant owed no duty to its passengers for defects in the cars of the Pullman Company, then the railroad is not liable, and the verdict should be reversed. If, on the contrary, the railroad company, under its contract of carriage with its passengers, is liable for such defects, and cannot defend on the ground that under a contract with the Pullman Car Company the latter company furnished the cars, then the verdict must be sustained. The question is not whether a judgment could be maintained by the plaintiff against the Pullman Company, but whether

it can be sustained against the railroad company. If the court had directed a verdict for the railroad company, and had left the question of the negligence of the Pullman Company in providing these cars for use of passengers to the jury, the sole question would have been, was the Pullman Company liable to a passenger for these defects in its own cars? Whether the Pullman Car Company is bound under its contract to indemnify the railroad company is not involved in this litigation. In a suit by the former company against the latter involving the liability of the latter to the former for the injury the decision rendered by the court in this case is not *res adjudicata.* Upon that question no such issue is raised by the pleadings. Warren *v.* B. & M. R. Co., 163 Mass. 484, 40 N. E. 895; Buffington *v.* Cook, 35 Ala. 312, 73 Am. Dec. 491. Plaintiff might have brought suit against the railroad company alone, or might at any time have discontinued it against the Pullman Car Company. Moreland *v.* Durocher, 121 Mich. 398, 80 N. W. 284; Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419. It is unnecessary to determine the question of the liability of the Pullman Company to the plaintiff, and we refrain from discussing it. The deceased's contract of carriage was not made with the Pullman Company; it was made with the railroad company. He knew nothing of the contract relations between the two defendants. It is quite likely that he did not know that the cars were owned, controlled, and managed by a separate company. As to the deceased, therefore, the railroad company owed to him the duty to see that the cars which were run over its road were properly equipped, in good condition, and properly managed. It failed in this duty, and cannot evade it by showing that it had a contract with another company to do it. From the description of the defects, they evidently existed when these cars were placed by the defendant upon its tracks for the transportation of the deceased and others. Defendant placed its dining car at the rear of the train, and invited its passengers to go to and from it. It was therefore bound to provide them a safe passage from one car to another. Penn. R. R. Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141; Dwinelle *v.* N. Y. C. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611. See, also, Robinson *v.* Benev. Soc., 132 Mich. 695, 94 N. W. 211. It follows from what we have said that there was no error in refusing to submit special questions 4 and 5 to the jury.

3. It is, however, urged that, the accident causing this injury occurring in the state of Illinois, this case will be ruled by the *lex loci.* It is urged that the courts of that state have decided that the Pullman Car Company is liable, and cite Nevin *v.* Pullman Car

Company, 106 Ill. 222, 46 Am. Rep. 688; Pullman Company *v.* Fielding, 62 Ill. App. 577. In Nevin *v.* The Pullman Company the plaintiff, a passenger, was refused a berth in a sleeping car of the defendant. In Pullman Company *v.* Fielding a passenger occupied an upper berth. Becoming ill in the night, he rang the bell for the porter, desiring to be assisted in descending from his berth. The porter did not respond. Plaintiff then attempted to get out of the berth alone, and by a lurching of the car was thrown and injured. It will be observed that in neither of these was there any defect in the cars provided for in the management. The railroad company had performed its duty towards the traveler in furnishing safe and suitable cars. The negligent acts complained of were solely those of the Pullman Car Company's employés. Whether the railroad companies would have been liable as well if the parties had seen fit to sue them on the ground that the companies had provided sleeping cars for the use of their passengers was not determined in either of those cases. In Pullman Company *v.* Fielding suit was brought against both the railroad company and the Pullman Company, and a verdict rendered against both. Pending a motion for a new trial, the plaintiff discontinued his suit against the railroad company. Those cases decided simply that under their facts the Pullman Company was liable. They do not decide that the railroad company was not liable. Neither do they decide that the railroad company would not be liable to a passenger for defects in cars furnished by the former for the use of the latter in transporting its passengers. This contention, therefore, cannot be sustained.[2]

STATE *ex rel.* MATTOON *v.* REPUBLICAN VALLEY RAILROAD CO.

17 Neb. 647. 1885.[1]

COBB, Ch. J. This is an original application to this court for a writ of mandamus requiring the respondent, the Republican Valley Railroad Company, to build within the corporate limits of the city of Blue Springs a depot, and to lay down the necessary side tracks and switches, and to stop its trains thereat for the proper transaction of business.

So far then as the case is presented by the pleadings, it involves these two questions:

[2] See St. Louis & S. W. Ry. Co. *v.* Campbell (1902), 30 Tex. Civ. App. 35; Missouri, K. & T. Ry. Co. *v.* Harrison (1904), 97 Tex. 611.

[1] Arguments of counsel and part of the opinion are omitted.— ED.

1, Is the depot of respondent at Wymore sufficiently near to the business portion of Blue Springs as to afford her inhabitants and merchants, and particularly the relator, all the facilities and accommodations which the respondent owes them as a common carrier, one of whose lines runs through the last named city, without discrimination against the business and inhabitants thereof? If not, 2, Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular services thereat, both at Wymore and Blue Springs?

The more important and *quasi* public question of the power of the courts in the absence of legislation to compel the respondent to establish and maintain a depot at Blue Springs, is raised by respondent in its brief, and that question will be first considered.

Relator in his brief contends that the legislature of the state has imposed upon the respondent the duty of furnishing side tracks and depots, and stopping its trains for the receipt and discharge of passengers and freight, and the proper transaction of business at all places upon their road, etc., and he cites section 121, of chapter 16, Comp. Stat., in support of that proposition. The section reads as follows: "Sec. 121. Every such railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their said road, on the due payment of fare or freight bill."

I do not think that this section furnishes authority for the interference of the courts to compel the establishment of a depot or station at any point on the line of respondent's road, but on the contrary, it is quite apparent upon the face of the section that every duty thereby imposed is qualified by the words, "to and from such stations as the trains stop at," and its application limited to established depots.

But in the opinion of this court it has authority to grant relief in cases such as that presented in this case, yet for the source of its authority it must look to the principles of the common law rather than to legislative enactments. The respondent is a common carrier of persons and merchandise. At common law it was the duty of a common carrier by land to deliver freight personally to the consignee; but when railways took the place of conveyances drawn by animals, necessity required the relaxation of this rule so as to allow of the substitution in place of personal delivery

a delivery at the warehouse or depot provided by the companies for the storage of goods. Vincent *et al. v.* C. & A. R. R. Co., 49 Ill., 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed that motives of self-interest almost always secure its observance. But when for any reason it is neglected or refused, may it not be enforced the same as any other public duty?

This question can scarcely be said to be a new one in this court. In the case of The State, *ex rel.* Webster, *v.* Nebraska Telephone Co., *ante* p. 126, this court issued a peremptory mandamus, compelling the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to its subscribers. In the opinion by Judge REESE, he says: "Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertake to supply a demand which is 'affected with a public interest,' it must supply all alike who are alike situated, and not discriminate in favor of nor against any." As a question of power, I fail to see any ground for distinguishing between that which compels a telephone company to furnish a separate instrument for the accommodation of one customer, and that which would compel a railroad company to make stoppage of its trains and furnish depot accommodations to a whole community. In neither case would any court interfere except where it is made to appear that such interference is necessary to prevent an unjust discrimination, or an abuse of that discretion which must be conceded to reside in all private corporations in respect to their dealings with the public.

The record in this case does not present the question of the power of the state to impose new duties upon railroad companies, or to take away or limit their powers by appropriate legislation. Nor does it present the question of the power of the courts to enforce the performance of every duty enjoined upon such corporations, either by the acts under which they derive their corporate existence or other legislation. If either of these questions were presented there would be abundant authority for their decision in the works and cases cited by counsel. But upon the precise point of the power of the court to enforce the discharge of a duty by the railroad company not specially enjoined upon it by the terms of its charter, nor any provision of statutory law, which, as above

stated, I conceive to be the turning point in this case, there is but very little.

There are many opinions of courts and *dicta* in cases cited by counsel wherein the assumed right of railway corporations to discriminate between shippers and others is discussed, deprecated, and denied. Such discrimination is in but few cases upheld, and then only when such discrimination is shown not to be unjust to the complaining party. The remarks of Chief Justice Beasley, of the supreme court of New Jersey, in the case of Messenger *v.* Pennsylvania R. R. Co., 36 N. J. L., 407, are so entirely in accord with the views of this court that I deem it not out of place to transcribe them here. "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded, without violating natural equity and fundamental principles. And it seems to me impossible to concede that when such rights as these are handed over on public considerations to a company of individuals, such rights lose their essential characteristics. I think they are unalterably parts of the supreme authority, and in whatsoever hands they may be found they must be considered as such. In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention when such privileges were given that they were to be used as private property at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must in the exercise of their calling observe to all men a perfect impartiality."

While I frankly admit that I am able to find no case — certainly none has been cited by counsel — where the above principles have been applied to circumstances exactly like those of the case

at bar, yet I am unable to distinguish it in principle from those in which it has been often applied, and we are, I think, unanimously of the opinion that they furnish us sufficient warrant for the exercise of the authority invoked.

As to the two questions presented by the record as above stated — 1, Whether the depot of respondent at Wymore is sufficiently near to the business portion of Blue Springs as to afford the latter named place all the facilities and accommodations which the respondent owes to them, as a common carrier, etc.? And if not, then, 2, Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular service thereat both at Wymore and Blue Springs? — we have, upon thorough examination of the evidence and consideration of the same, together with arguments thereon, as well at the bar as in the exhaustive printed briefs of counsel, found both of these questions for the relator.

A peremptory writ will therefore issue, substantially as prayed, with costs, etc.

Judgment Accordingly.[2]

The other judges concur.

STATE *ex rel.* SMART *v.* KANSAS CITY, SHREVEPORT AND GULF RAILWAY CO.

51 La. Ann. 200. 1899.[1]

NICHOLLS, C. J. As matters stand the only question before us is whether, as a matter of law, the plaintiffs have the right, through mandamus, to force the defendant to establish a depot at Leesville. The supreme court of the United States was called upon to consider this question in Railroad Co. *v.* Washington Ter., 142 U. S. 492, 12 Sup. Ct. 283, under a state of facts very similar to those alleged by the plaintiffs in their petition. The facts of that case, as shown by the report of the court's opinion, were that "the Northern Pacific Railroad at one time stopped its trains at Yakima City, but never built a station there, and after completing its road four miles further, to North Yakima, established there a freight and passenger station; that North Yakima was a town laid out by the defendant on its own unimproved land; that, after having established this depot, defendant ceased to stop its trains at Yakima

[2] See People *ex rel.* Hunt *v.* Chicago & A. R. R. Co. (1889), 130 Ill. 175. Compare Chicago & A. R. R. Co. *v.* People (1894), 152 Ill. 230, and Chicago, R. I. & P. Ry. Co. *v.* Nebraska Ry. Com. (1910), 85 Neb. 818.

[1] Part of the opinion is omitted.— ED.

City. In consequence, apparently, of this, Yakima City, which at the time of the filing of the petition for mandamus was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. The defendant could build a station at Yakima City, but the cost of building one would be eight thousand dollars, and the expense of maintaining it one hundred and fifty dollars a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay the running expenses.

"There were other stations for receiving freight and passengers between Yakima and Pasco Junction, which furnished sufficient facilities for the country south of North Yakima, which included Yakima City; and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. After the verdict, and before the district court awarded the mandamus, the county seat was removed by the territorial legislature from Yakima City to North Yakima."

In discussing the question the supreme court of the United States declared that "a writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of that duty. If, as in Railroad Co. *v.* Hall, 91 U. S. 343, the charter of a railroad company expressly requires it to maintain its railroad on a continuous line, it may be compelled to do so by mandamus.

"The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to, one point or another, which are more appropriate to be determined by the directors, or, in case of their abuse, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals."

Referring to the case directly before it, the court said: "To hold that the directors of this company, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases."

The court quoted approvingly from People *v.* New York, L. E. & W. R. Co., 104 N. Y. 58, 66, 67, 9 N. E. 856, in which the court of appeals refused to grant a mandamus to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so.

The court, speaking by Judge Danforth, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation at common law to provide warehouses for freight offered, or station houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and "to erect and maintain all necessary and convenient buildings and stations" for the accommodation and use of their passengers, freight, and business, and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than a request for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced.

The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus.

It cannot compel the erection of a station house, nor the enlargement of one. As to that the statute imports an authority only, not a command, to be availed of at the option of the company, in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only where the duty concerned is specific, and plainly imposed upon the corporation."

"Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation, upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by fair or reasonable construction be implied." [2]

The mandamus in Railroad Co. *v.* Washington Ter. was refused, though presented in the name of the territory on the relation of its prosecuting attorney. The mandamus in the case at bar was presented in the name of private individuals, whose special interest in the subject-matter, as differing from that of the public at large, and giving them a right to stand in judgment, might be questioned. No issue was made, however, upon that point in the briefs or argument.

In Southeastern Ry. *v.* Railway Com'rs, 6 Q. B. Div. 586, 592, a railway company was held, by Lord Chancellor Selborne, Lord Chief Justice Coleridge, and Lord Justice Brett, in the English court of appeal, to be under no obligation to establish stations at any particular place or places, unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and freight at a station once established, and used for the purpose of traffic, only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by act of parliament.

The decisions in Railroad Co. *v.* Washington Ter. and in People *v.* New York, L. E. & W. R. Co., 104 N. Y. 58, 66, 67, 9 N. E. 856, were, in our opinion, based upon correct principles, which should and must control the present case.

For the reasons herein assigned, it is ordered, adjudged, and

[2] But see People *v.* Del. & H. Canal Co. (1901), 165 N. Y. 362.

decreed that the judgment of the district court be affirmed, without prejudice.[8]

MINNEAPOLIS AND ST. LOUIS RAILROAD CO. *v.* STATE OF MINNESOTA.

193 U. S. 53. 1904.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a proceeding in mandamus to compel plaintiff in error to build and maintain a station house on the line of its road at the village of Emmons, in compliance with an order of the Railroad & Warehouse Commission of the state of Minnesota.

The order of the commission was made upon petition and upon hearing after due notice to plaintiff in error. The writ was granted by the district court of Freeborn county, where the proceedings were commenced.

The railroad company in its answer attacks the statute under which the commission acted as follows:

"This respondent says further, that chapter 270, General Laws 1901, approved April 13, 1901, which was enacted by the legislature of said state at its thirty-second session, which arbitrarily requires railroad carriers to provide freight and passenger rooms and depots at all villages and boroughs upon their respective roads, without regard to the necessity therefor and without regard to the location or situation of such village or boroughs, or to existing conditions, is unjust, unreasonable, contrary to public policy, and void.

"It denies to the respondent the right to reasonably manage or control its own business; it takes its property without its consent.

"It takes the property of this respondent arbitrarily and unnecessarily, for public use, without just compensation, and is, therefore, violative of the 5th Amendment to the Constitution of the United States.

"It deprives the respondent of its property without due process of law, and denies it the equal protection of the laws, and thus violates the 14th Amendment to the Constitution of the United States."

The Supreme Court of the State affirmed the judgment of the District Court, the members of the court equally dividing on the facts. 91 N. W. Rep. 465.

This is the second attempt of the village of Emmons to secure

[8] See Nashville, C. & St. L. Ry. Co. *v.* State (1902), 137 Ala. 439.

[1] Arguments of counsel and part of the opinion are omitted.— ED.

a depot. The first was unsuccessful, 76 Minn. 469, 79 N. W. 510, "wherein the facts are stated," the Supreme Court observed; and it further observed, passing on the case at bar:

"Mr. Associate Justice Lovely having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court. We assume that Laws 1901, chapter 270, which, in express terms, requires railway companies to build and maintain depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this state located on railway lines are *prima facie* entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof; for, prior to its enactment, the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railway company appearing before the commissioners, or trying its case on appeal to the District Court, bears the burden of showing that such a requirement is not called for, and that the building and maintenance of a depot in the village is unnecessary and unreasonable.

"But, while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Chief Justice Start and Associate Justice Brown, are of the opinion that, from the evidence, it appears that there has since been a substantial growth in the village,— a growth which makes an altogether different showing,— and that the company did not overcome the *prima facie* case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justices Collins and Lewis are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered, and that the *prima facie* case made by the village has been wholly overcome by the defendant company.

"With this difference of opinion the judgment appealed from must be, and hereby is, affirmed."

The act of 1897 provided as follows:

"That all railroad corporations or companies operating any railroad in this state shall . . . provide at all villages and boroughs on their respective roads depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight. . . . Such railroad corporations or companies shall, at such depots or stations, stop their trains regularly as at other stations, to receive and discharge passengers, and, for at least one half hour before the arrival, and one half hour after the arrival, of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid."

In its first opinion (76 Minn. 469, 79 N. W. 510), the court held that the word "villages," in the act meant incorporated villages, and that Emmons was not incorporated. The court, however, proceeded further, and said:

"But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary. The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large and of the railroad company itself, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the place in question. Counsel for the relators admit this. The only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether the facts therein stated reasonably justified their order requiring the railroad company to provide and maintain a depot and station at Emmons. The statute provides that, 'upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners], the findings of fact of said commission as set forth in its report shall be *prima facie* evidence of the matters therein stated.' (Gen. Stat. 1894, § 399.)"

The court then reviewed the facts, and decided that the order of the commission establishing a station at Emmons was unreasonable. The act was amended in 1901, and the court in the case at bar has decided, as we have seen, the amendment has only shifted the burden of proof. In other words, to quote from the

opinion of the court, "incorporated villages within this state (Minnesota) located on railway lines are *prima facie* entitled to depots," and at a hearing before the commissioners and in the district court the railroad has the burden of showing that the establishment of a depot is unreasonable and unnecessary.

The statute, as thus construed, does not transcend the power of the state. In other words, and meeting exactly the contention of plaintiff in error, the statute does not deny plaintiff in error the right to reasonably manage or control its property or arbitrarily take its property without its consent or without compensation or due process of law. Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287. To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising, certainly does not amount to an invasion of the rights of property or an unreasonable control of property.

There is no statement of facts by the supreme court, and its decision, though by a divided court, constituted an affirmance of the finding of the district court. The finding was as follows:

"That the respondent railroad company has no depot or station house whatever for the accommodation of the public upon its line of railroad at the village of Emmons, and that its line of road is the only railroad reaching such village.

"That there is a suitable location for a depot or station house upon respondent's right of way at the point referred to and described in the order of the board of railroad and warehouse commissioners herein, which order is hereto attached. That it is necessary for the accommodation of the citizens of Emmons and vicinity, and the public at large, and public necessity requires that the respondent railroad company build and maintain a suitable station house at the said village of Emmons for the accommodation of the public transacting business with the respondent at that point."

The finding, like the verdict of a jury, is conclusive in this court. Dower *v.* Richards, 151 U. S. 658. It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is affirmed.[2]

[2] Compare Missouri, K. & T. Ry. Co. *v.* State (1910), 107 Pac. (Okl.) 172, and cases there cited, as to the power of legislatures and commissions to order the stopping of particular trains at particular stations.

PEOPLE *ex rel.* SPRUANCE *v.* CHICAGO AND NORTHWESTERN RAILWAY CO.

57 Ill. 436. 1870.[1]

MR. JUSTICE WALKER delivered the opinion of the Court.

This was a proceeding by mandamus, on the part of appellants, in the Superior Court of Chicago, against appellees. The object of the proceeding was, to compel the railroad company to permit the junction of a railway track from the grain elevator of appellants, with the main track of appellees' road, and when thus connected, to compel the company to deliver at the warehouse all grain shipped to it, for storage. The writ avers, that the warehouse was erected by Maher and Newberry in the year 1862, on land then, and now, owned by Maher; that the elevator is a public warehouse for the storage of grain; that the railway company, under an ordinance of the city, laid and constructed their railway tracks from the western limits of the city along Kinzie street, across the north branch of the Chicago river, and thence along North Water street to the lake shore.

It is averred, on the belief of the relators, that before the warehouse was erected, an agreement was made between the Galena & Chicago Union Railroad Company (which was subsequently consolidated with appellees' company) and Maher, that a switch might be placed in their track, and a road run thence to the warehouse, which was intended to enable freight cars to pass from their main track to the warehouse, and there discharge grain shipped to it for storage; and that Maher and Newberry obtained a license to make such connection, from the city, by an ordinance duly adopted; and, thereupon, one Hiram Wheeler obtained, by lease of Maher, his interest in this elevator, and he thereupon constructed a railroad track from the main line of the company to the warehouse, and the company from that time used the same, and ran their cars to the elevator, and there discharged such grain as was consignel to it for storage; that some time during the year 1865, Wheeler ceased to have any interest in this warehouse, and the railroad company thence refused to deliver grain at that warehouse; that about a year afterwards, Wheeler, who had control of a portion of the ground over which this track ran, compelled its removal, and the connection was thus broken with the consent of the company; that appellants became the lessees of the warehouse in August, 1869; that they had complied with the ordinance of the city so as to ac-

[1] Part of the opinion is omitted.— ED.

quire the right to construct a track from the warehouse to the main track of the company, and applied to the company to connect the same with their road, and that they would carry to, and deliver, such grain as might be consigned to it for storage, but the company had refused, and still refuse; that appellees have railroad connections with a number of other warehouses at which they deliver grain, and that this and other companies running into Chicago do not have the necessary facilities for storing grain, but depend upon private enterprise for the purpose; that it is the custom and usage of all such railroads to use such connecting tracks to deliver grain at various elevators in the city, and that this road unlawfully discriminates against appellants in refusing to deliver grain at their warehouse, or in not permitting them to form such a connection with their road as would render it easy and convenient to thus deliver grain.

It is also averred, that such unlawful discrimination is induced by a contract entered into by the company with other warehousemen, only to deliver grain transported over their roads to the warehouses of such parties.

It is averred, that relators have no adequate remedy at law, and it concludes with a prayer that the railroad company be compelled to permit them to construct a track, connecting their warehouse with the railroad, by a switch, and then to carry and deliver to them all grain that may be consigned to their warehouse for storage.

To this writ, appellees demurred, and it was sustained by the court, and a judgment was rendered in favor of the company. To reverse the judgment, relators have brought the record to this court by appeal, and assign for error the sustaining of the demurrer to the writ.

In the case of Vincent *v.* Chicago & Alton Railroad Co. 49 Ill. 33, it was held that: "A railway company can, unquestionably, refuse to allow the owners of adjacent property to lay down a side-track connecting with its own rails." Appellants admit, that, under the rules of the common law, this company could not be compelled to permit appellants to unite their track with that of the company, but they insist, that the railroads entering Chicago, having established a custom whereby all public warehouses have been permitted to make such a connection, and grain having been, by them, delivered in bulk into such warehouses, it therefore follows that appellees can not make a discrimination between the different warehouses.

The averments of the writ do not bear the construction that this company had permitted the owners of all other elevators to thus connect with their road; nor does it appear that all are so con-

nected. But even had it been averred, that all warehouses in the city, except that of appellants, were so connected, still there is no averment of the terms or conditions upon which the connections had been made. And it certainly fails to appear that it had been, or was the usage, that such warehouses might be thus brought in connection with this or other roads, without the consent of the companies; and in the absence of such an averment, we would not presume such a custom to exist. Even if such an averment had been made, we are not prepared to hold that such a usage, for so short a period, would have acquired the force and effect of a law, repealing or abrogating their common law right to refuse. Customs that obtain the force of laws, are not thus readily obtained. We are, therefore, clearly of opinion, that under the rules of the common law, or under the custom averred in the writ, we have no power to compel this connection, without the consent of appellees.[2]

OLANTA COAL MINING CO. *v.* BEECH CREEK RAILROAD CO.

144 Fed. 150. 1906.

BUFFINGTON, District Judge. This is a bill in equity brought August 1, 1904, by the Olanta Coal Mining Company, a corporation of the state of Pennsylvania, in the court of common pleas of Clearfield county, Pa., against the Beech Creek Railroad Company, a corporation of the same state, and its lessee, the New York Central & Hudson River Railroad Company, a corporation of the state of New York. The latter company alleged itself to be the real and only party in interest, and removed the case to this court.

Passing by the many irrelevant matters and proofs in the voluminous record, we address ourselves to the gist of the bill, which, in substance, is to compel the railroad to permit switch connections with its line to enable complainant to ship its coal to market. The latter is a coal mining corporation, chartered July 9, 1903, and by its charter is authorized to carry on the business "of mining, shipping and selling of coal and the manufacturing, shipping and selling of coke and other products of coal." Its mining property of some 610 acres contains approximately 550 acres of coal, in which are several different veins. The property adjoins the right

[2] Compare Farwell F. W. Assn. *v.* Minneapolis, St. P. & S. Ste. M. Ry. Co. (1893), 55 Minn. 8.

See also Vincent *v.* Chicago & W. R. R. Co. (1868), 49 Ill. 33, and also Chicago & A. R. R. Co. *v.* Suffern (1889), 129 Ill. 274.

Compare State *v.* Missouri P. Ry. Co. (1890), 29 Neb. 550, and West *v.* London & N. W. Ry. Co. (1870), L. R. 5 C. P. 622.

of way of the railroad. It has no other outlet for its coal save said road. The Beech Creek Railroad Company was chartered under the provisions of the general railroad act of Pennsylvania of April 4, 1868, and its supplements. It leased its property to the New York Central Railroad Company by a long term lease. It is conceded that all its duties and obligations rest on its lessee, the New York Company. By virtue of the Constitution of Pennsylvania (Article 17, § 1), which provides, "All railroads and canals shall be public highways, and all railroads and canal companies shall be common carriers," and the general railroad law of February 19, 1849, which provides, "Upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the convenience of passengers and the transportation of freight," the Beech Creek Railroad is a public highway and is chargeable with the duties and obligations of a common carrier. Such is the view of the highest courts of that state. In Railroad Company *v.* Colwell, 39 Pa. 339, 80 Am. Dec. 526, it is said:

"Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out."

And this accords with the general federal view. "The question," says the Supreme Court of the United States, in Cherokee Nation *v.* Southern Kansas Railroad Company, 135 U. S. 657, 10 Sup. Ct. 965, 34 L. Ed. 295, "is no longer an open one, as to whether a railroad is a public highway established primarily for the convenience of the people and to subserve public ends." Its road then being a public highway, and it a common carrier, its duty, generally stated, is to receive from any person for carriage and transportation such freight as the carrier holds itself out as willing to carry and the party sending offers to pay freight upon. New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Southern Express Company *v.* St. Louis, 5 Myer's Fed. Decisions, § 1511. Now in mining, coal is carried from the mines in small cars and delivered to and carried by railroad companies in car load lots. To do this requires sidings on which the railroad's cars may be conveniently handled and filled. Such a connection the complainant asks, and is willing to bear the expense of making. Whatever may be the rights of shippers and the obligations of railroads in other jurisdictions, the general right of the adjoining property holders in Pennsylvania to such connection with a railroad chartered by that state has been decided by the highest court of that state in the case of the Pittsburgh & Lake Erie Railroad Company *v.* Robinson, 95 Pa. 428. There Robinson was

the owner of a manufacturing site adjoining the railroad, and the question was the value of the land which the railroad was condemning in part. It was held that the property owner had a right to switch connection with the railroad, and that this right was an element in determining the value of his land and the proposition "that the defendant company is a common carrier, that its railroad is a public highway, that the plaintiffs have a right in law to construct on their land, adjoining said railroad, a suitable switch for the uses of their business, and connect the same with the tracks of the defendant company, subject to the general rules of said company regulating such connections, and that the defendant company is bound to receive and deliver to and from such switch or siding, cars and freight for the said plaintiffs to and from such points, on the line of defendant's railroad, as may be designated by plaintiffs, and on equal terms with all other individuals or transportation companies," was held a proper definition of his rights in that regard. In considering this proposition, the court said:

"We are also of opinion that the plaintiff's third point should have been affirmed. It is conceded that, under our acts of Assembly, the owner of mills and manufactories may of right connect their private sidings with the railroads of their vicinity, and though, as the counsel for the defendant in error says, it does not follow that such owners may ever avail themselves of such right, nevertheless, the fact that such a right exists in them may largely advance the market value of their several properties. Certainly privileges which may be used to facilitate transportation to and from large factories must have some effect upon their values."

Under this construction thus placed upon its own laws by the court of highest resort of Pennsylvania, the right of a mine operator to proper and reasonable switch connections is clear, unless there is something in the facts and circumstances of the particular case warranting a refusal of this right. We find none here. The complainant offers to bear the entire expense of the connection and siding. It is willing that the connection be made in the mode and at the point the respondent prefers. We are not impressed with the contention of the respondent that there are engineering difficulties in locating a switch to reach a siding for the complainant. No such question was raised during the many interviews between these parties prior to the refusal of the railroad company to grant a switch connection. The answer to the bill by the New York Central Railroad Company avers no such difficulties. On the contrary, the answer admitted "that it is abundantly able to grant the siding and the track connections with its road and has granted unto Irish Bros., miners and shippers of coal, a siding or track connection, and

has also granted and constructed other sidings and switching connections for other lessees of coal and operators along the line of the Pennsylvania Division of the New York Central & Hudson River Railroad, meaning thereby the Beech Creek Railroad." It was not until a year after the answer was filed that the question of engineering difficulties was raised by an amendment then made. Under the proceedings and proofs, we are of opinion, and so find, that the respondent has failed to show the existence of any engineering difficulties, hazards, or operating difficulties, which make it unreasonable, unwise, or inequitable for a chancellor to grant the prayer of this bill.

The second contention of the railroad is that the coal carried by the Beech Creek Road has gained a high reputation in the market, which has inured to the benefit of the road as a coal carrier and increased its trade; that the complainant's coal is of an inferior character, and its introduction into the market would injuriously affect the reputation of the coal market from that section, and so injure and decrease the carrying business of the road. We have been cited to no power or right vested in a common carrier to thus refuse to transport freight of the general class it is carrying because of the inferiority of the particular lot in question. The all-sufficient answer to a claim on the part of a common carrier to exercise such a power is simply that it does not exist, and the proofs in this case do not satisfy us that, if it did, the respondent has shown by the weight of the proof that its contention as to the character of complainant's coal is established, or that any such damage as is here averred to its business as a common carrier would ensue.

Let a decree be submitted for approval and signing.[1]

NORTHERN PACIFIC RAILWAY CO. *v.* RAILROAD COMMISSION OF WASHINGTON.

58 Wash. 360. 1910.[1]

GOSE, J. This appeal is prosecuted from a judgment of the superior court of Pierce county, affirming an order of the Railroad Commission requiring the appellant to construct and operate a spur track from its main line road to the sawmill of one H. A. Burnham. The appellant owns and operates a line of railroad, extending from Tacoma easterly and southeasterly through the

[1] See State *v.* White Oak Ry. Co. (1909), 65 W. Va. 15. Compare Butchers & D. S. Y. Co. *v.* Louisville & N. R. R. Co. (1895), 67 Fed. 35.

[1] The arguments of counsel and part of the opinion are omitted.— ED.

state and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about four miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations and about 300 feet from the appellant's main-line track. He manufactures about 6 car loads per week of lumber and other sawed timbers, for shipment over appellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about 2½ miles by wagon road, at an expense of about $40 a car load for hauling and loading. With a spur track to his mill, he could put his products aboard the car for about $5 per car load. He has demanded of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand. Upon a complaint alleging these facts, and also alleging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the operation of trains, the case was heard before the Railroad Commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines. The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. A compliance with the order would require switching to the extent of about a mile, and would consume from a quarter to a half hour every time a car was taken to or from the mill.

The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the federal Constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. Healy Lumber Co. *v.* Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. A railroad is a public highway and, as such, is subject to regulation; but the regulation must be promotive of the public interest. Notwithstanding the fact that it is a public highway, its property is private. In Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, speaking of the fourteenth amendment, it is said: "It would be

difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. The difficulty, and perhaps impossibility was referred to by Mr. Justice Miller, in Davidson *v.* New Orleans, 96 U. S. 97 [24 L. Ed. 616], where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'" It is true that railroad companies may be required to fence their tracks, establish proper crossings at points of intersection with public roads, patrol their tracks at thickly populated points, establish depots and stations, provide suitable connection with intersecting lines, adopt suitable safety appliances for the coupling of cars, properly light and heat their cars and depots, and many other things which touch the public business. The sawmill of Mr. Burnham, while an important industry, is no more a public business than a flouring mill, a dairy, a farm, a livery barn, or a manufacturing plant of any other character or description.

In Missouri Pacific Railway Co. *v.* Nebraska, 217 U. S. 196, decided by the United States Supreme Court since the case at bar was argued, a statute providing that: "Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels"— and making railroads liable for a fine for failure to obey the command of the statute, was held unconstitutional. The case arose out of two suits based upon the statute. The first was brought by the state

of Nebraska to recover a fine of $500. The second was brought on the relation of the interested party, to compel the extension of a side track and the granting of shipping facilities; the railroad company having refused an application for a site for an elevator on its right of way. State *v.* Missouri Pacific Railway Co., 81 Neb. 15, 115 N. W. 614, and Farmers' Elevator Co. *v.* Same, 81 Neb. 174, 115 N. W. 757, were reversed; the court saying: "We are of the opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires." The same principle is announced in Chicago, B. & Q. R. Co. *v.* State, 50 Neb. 399, 69 N. W. 955, and State *v.* Chicago, Milwaukee & St. Paul Ry. Co. 36 Minn. 402, 31 N. W. 365.

However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the federal Constitution, as construed by the highest federal court and by this court as well, presents an insuperable barrier against compelling such accommodations.

The contention of the Attorney General that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the federal Constitution.

The judgment is reserved, with directions to dismiss the petition.

RUDKIN, C. J., and CHADWICK and MORRIS, JJ., concur.

FULLERTON, J. Since the Supreme Court of the United States holds that a railroad company cannot be compelled without compensation to afford facilities to a private shipper other than it offers at its general public stations, I am constrained to concur in the judgment the majority have directed to be entered in this case. I cannot concur, however, in all that is said in the opinion. I cannot concur in the view that to compel a railway company to stop at points other than its public stations and take on for carriage the property of a private shipper is taking its property for the private use of another in violation of the due process of law clauses in the state and federal Constitutions. As I understand it, the principal purpose for which a railroad is constructed is to carry from one point to another the private property of the individual;

that it is for this purpose it has its existence and is given the vast powers and rights it possesses. This function, then, the state may compel it to fulfill. If, therefore, its public stations do not afford an adequate facility for the shipment of the property of a particular individual, I know of no legal reason why the company cannot be compelled, on due compensation, to furnish that particular individual with additional facilities, even to the extent of putting in an additional side track for him. For this reason I dissent from the holding that to do so is to take private property for a private use.[2]

WINTERS METALLIC PAINT CO. *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.

16 I. C. C. 587. 1909.[1]

CLEMENTS, Commissioner.

In case No. 1601, besides challenging the reasonableness of the rates on ground iron ore from Iron Ridge to various destinations, complainant prays that the Commission order the construction and maintenance of a private side track from the main line of the St. Paul road to its mills, a distance of 425 feet over the property of the Illinois Steel Company and a public highway. At the hearing complainant's witness stated that his company would not undertake to build or to defray any part of the expense incident to the construction of this siding.

By section 1 of the amended act to regulate commerce the Commission is authorized to order the construction and maintenance, upon reasonable terms, of "a switch connection" with any lateral branch line of railroad, or "private side track *which may be constructed* to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." From the language of this section it is clear that the Commission has no authority to order the construction of a *private side track* by a railroad company, but that its authority is limited to ordering a carrier to make "a switch connection" *with* a private side track. Certainly our authority does not embrace the power to order a carrier to construct and maintain a side track off its right of way and without direct contribution by the shipper to the expense incident thereto.

[2] Compare Corporation Commission *v.* Railroad—"Industrial Siding Case" (1905), 140 N. C. 239.

[1] Only one point from the opinion is here reprinted.—ED.

DUNN *v.* WESTERN UNION TELEGRAPH CO.

2 Ga. App. 845. 1907.[1]

POWELL, J. The grave question remaining in the case is whether the petition sets forth a cause of action against the telegraph company. The gist of the action is not the failure or refusal of the telegraph company to transmit a message tendered to it, but the alleged disrespectful, humiliating, and insulting treatment by its agent of a member of the general public, lawfully in its office on business with the company. The contention is that the entire damage alleged is such as affects only the feelings of the plaintiff, and that damages for mental suffering cannot be recovered, unless there is a concomitant injury to person or purse. The further contention is made that no breach of duty to the plaintiff is shown. We will dispose of these contentions in inverse order.

A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in business *sui generis,* is immaterial. It is a public-service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations, on account of the interest which the public has in the manner in which their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. "Upon each person, in every position he occupies, peculiar duties are imposed, each demanding its discharge with an emphasis accentuated or modified by the attendant circumstances." Ray, Negligence of Imposed Duties, Personal, § 1, "One of the great requirements which the government demands of every institution impressed with a public interest, and one which is thrown over every citizen as a great and protective shield, is the duty to act impartially with all. They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted from others in like circumstances." Jones, Telegraph and Telephone Companies, § 236.

From this principle, universally recognized, springs the corollary

[1] Part of the opinion is omitted.— ED.

that all such persons, natural and artificial, shall afford to such members of the public as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do, safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety, nor this decency mere absence of obscenity; but by the employment of the expression "safe and decent access" it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact the business which the law compels a telegraph company to accept impartially from every person by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront. A violation of this duty has occurred whenever a person entering the telegraph office for the purpose of sending a message has been met with disrespectful or insulting treatment at the hands of the company's agents. It is immaterial that the person thus injured had no personal interest in the message, or that he was the mere agent of another; for there is no such requirement as that persons desiring to transact business with public utility corporations shall do so in person. The fact that the right of respectful treatment, while attempting to do business with a public service company, follows as the natural sequence from the right to be served impartially and at all reasonable times, seems to render the citation of authority as to the existence of this right of respectful treatment unnecessary. We do, however, call attention to the Georgia cases of Gasway *v.* Atlanta & West Point R. Co., 58 Ga. 216, 221, and Georgia R. Co. *v.* Richmond, 98 Ga. 495, 502, 25 S. E. 565. It will be noted that, while these were actions against carriers, in neither case did the liability depend upon the fact that the plaintiff was a passenger. In Gasway's case he was attempting to check baggage as agent for his wife. In Richmond's case he had called at the passenger station to see about certain trunks, and the court in deciding the case, took pains to call attention to the fact that the relation of carrier and passenger did not exist at that time. We might multiply citation of precedents, but these are sufficient.

The telegraph company, therefore, violated its duty towards the plaintiff, in that it did not afford him safe and decent access to its office. The plaintiff suffered the injury of humiliation and wounded feelings. Is it a case of *damnum absque injuria,* because no injury to purse or person also ensued? That damages for mental suffering are compensatory in character can hardly be open to question. "Wounding a man's feelings is as much actual dam-

age as breaking his limbs. The difference is that one is internal and the other external; the one mental, the other physical." Head *v.* Ga. Pac. R. Co., 79 Ga. 358, 360, 7 S. E. 217, 218, 11 Am. St. Rep. 434; Smith *v.* Overby, 30 Ga. 241, 248. Such damages may in the very nature of things be just as proximately and naturally the consequence of the defendant's wrong as any other damage; so that there is no legitimate objection to their allowance for any lack of this element. Of course, there may be cases where mental suffering is not a proximate and natural result of an injury; but this is true as to any other form of damage. Nor can it be justly said that an allowance for mental suffering is any more speculative or conjectural than damages for physical pain and suffering. Those cases which preclude recovery of damages for mental suffering, when no other injury is shown, cannot fairly rest on any of these grounds, but must be based upon the theory presented by Allen, J., in the case of Spade *v.* Lynn, etc., R. 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, that the rule is purely arbitrary, though actually existent in certain classes of cases. See, also, Homans *v.* Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, wherein the court, through Holmes, J., says that the rule, being arbitrary, is not to be extended.

This arbitrary rule is generally applied only to those cases where the injury is the result of mere neglect. The leading case of Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, as well as the cases which have followed it, puts this state in line with those that hold that, in actions on account of wrongs merely negligent, mental suffering unaccompanied by other injury cannot be the basis of a recovery. Those courts, however, who assert this doctrine even most strenuously, do not extend its application to those intentional injuries of which insult, humiliation, and mental suffering are the natural consequences. As Allen, J., in the Spade case, *supra,* says: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred." By this distinction there can be seen between the case of Chapman *v.* Telegraph Company, *supra,* and that of Cole *v.* Railway Company, 102 Ga. 474, 31 S. E. 107, a clear, logical discrimination. The holding in the Cole case is undoubtedly the law, and is unequivocally supported by authority. There a railway conductor intentionally and wantonly insulted a passenger, not by using slanderous language to him, as the court intimates in the opinion (for the language was not *per se* slanderous, and there was no allega-

tions stating it to be so for any special reason), but by using to him insulting and humiliating language. The whole injury was to the plaintiff's feelings. The court says that case is distinguishable from the Chapman case; and it is, not because the plaintiff in the Cole case was slandered, but because that was an action upon a malicious and intentional tort, the other upon a merely negligent, though wrongful, omission. See Watson on Damages, § 399; Burdick, Law of Torts, 101; Wilkinson *v.* Downtown, [1897] 2 Q. B. 57 (wherein a recovery was upheld in favor of a wife for mental shock on account of defendant's falsely and maliciously telling her that her husband had been seriously wounded); Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833 (where a recovery by a wife for mental suffering occasioned by the alienation of her husband's affections was held proper, though no financial loss in the matter of support was shown). See, also, Barbee *v.* Reese, 60 Miss. 906; Conklin *v.* Thompson, 29 Barb. (N. Y.) 218.

CHAPTER VII

WITHDRAWAL FROM PUBLIC SERVICE.

ANONYMOUS.

Godbolt, 345. 1623.[1]

If an Inn-keeper taketh down his Signe, and yet keepeth a hosterie, an Action upon the Case will lie against him, if he do deny lodging unto a travailer for his money; but if he taketh down his Signe, and giveth over the keeping of an Inn, then he is discharged from giving lodging.

SATTERLEE *v.* GROAT.

1 Wend. 272. 1828.[1]

By the Court, Sutherland, J. The defendant was a common carrier between Schenectady and Albany, previous to 1819. He then sold out all his teams but one, which he kept for agricultural purposes on his farm. One witness, however, testified, that defendant employed his team in the carrying and forwarding business, as occasions offered, until 1822 or 1823. But subsequent to that period, there is no evidence whatever of his carrying or forwarding a single load, until April, 1824, when one John Dows applied to him, very urgently, to bring some loads for him from Albany to Schenectady, to which the defendant reluctantly consented, and despatched one *Asia* with his team for the purpose, with special instructions to bring nothing for any other person; if Dows' goods were not ready, to come back empty. He brought two loads and returned for a third, under the same instructions, repeated again and again; but Dows' third load not being ready, instead of returning empty as he was directed to do, he applied to the plaintiffs for a load, which they furnished him, to be carried to Frankfort, in Herkimer county. He arrived at Schenectady late at night. The next morning it was discovered that one of the boxes had been broken open, and a part of the goods stolen.

[1] Only an extract from the case is here reprinted.— Ed.

[1] The statement of the case is omitted.— Ed.

The defendant disavowed all responsibility for the goods, before it was discovered that any of them had been taken, and declared that *Asia* had violated his express instructions in bringing them. Asia was subsequently convicted of the theft, and sent to the state prison. The defendant gave immediate notice to the plaintiffs of all the facts, and that he did not hold himself responsible for the goods.

The judge charged the jury, that if the defendant was responsible at all, it was either on the general liability of a common carrier, and that depended upon the fact, whether he was, at the time, a common carrier or not; or upon a special contract for carrying the goods. That it was for the jury to determine, whether the defendant was, at the time, acting in the capacity of a common carrier; and if they believed that the teamster had been specially employed by the defendant, for a particular purpose and object, then he could not bind the defendant by a contract beyond his special employment. The jury found for the defendant.

The law was correctly laid down by the judge. The defendant stood upon the same footing, as though he had never been engaged in the forwarding business. He had abandoned it entirely certainly *one year,* and according to the weight of evidence, four years previous to this transaction. He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instructions to bring goods for no one else. He was acting under a special contract, and not in the capacity of a common carrier. Is he then responsible for the act of his servant, done in violation of his instructions, and not in the ordinary course of the business in which he was employed? If a farmer send his servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, is the master responsible? Most clearly not. It was an act beyond the scope of the general authority of the servant, *quoad hoc,* therefore he acted for himself and on his own responsibility, and not for his employer.

The verdict is according to the weight of evidence. There is nothing in the ground of surprise; if there was, it should have been the subject of a special motion.

Motion for new trial denied.[2]

[2] "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control." Munn *v.* Illinois (1876), 94 U. S. 113, 126.

THE YORK AND NORTH MIDLAND RAILWAY CO. *v.* THE QUEEN ON THE PROSECUTION OF BURTON AND LEAING.

1 Ellis & Bl. 858. 1853.[1]

JERVIS, C. J., in this term (April 29th), delivered judgment.

This was a writ of error from a judgment of the Court of Queen's Bench, upon a demurrer to a return to a mandamus commanding the plaintiffs in error, the defendants in the Court below, to purchase lands and make a railway from Market Weighton to Cherry Burton, pursuant to stat. 12 & 13 Vict. c. lx., the York and North Midland Railway Act of 1849. After argument and time taken to consider in that Court, my brother ERLE was of opinion that the plaintiffs in error were entitled to judgment; but Lord CAMPBELL was of a different opinion: and, my brother CROMPTON concurring with him, the prosecutors had judgment; and a peremptory mandamus was awarded.

We have carefully considered this case; and, having examined the authorities cited, and the statutes, are of opinion that my brother ERLE was right in the view which he took of it; that the judgment ought to have been given for the plaintiffs in error and not for the prosecutors; and that the judgment of the Court of Queen's Bench must be reversed.

The facts which raise the question may be shortly stated. In 1846 the plaintiffs in error obtained an Act empowering them to make a railway from York, through Market Weighton and Cherry Burton to Beverley. They made a portion of this line, from York to Market Weighton, but did nothing upon the remainder of it. The powers of their Act expired, as to so much of their line as lies between Cherry Burton and Beverley, before the mandamus was applied for: but in 1849 they obtained an Act, authorizing them to abandon the line between Market Weighton and Cherry Burton, and to substitute in lieu thereof the line now under discussion.[2]

There remains but one further view of the case to be considered; and of that we have partly disposed in the observations which we have already made. But, in as much as Lord CAMPBELL proceeded upon this ground only in the Court below, although it was not

[1] A map and part of the opinion are omitted.— ED.

[2] In the part of the opinion omitted the court decided that there was nothing in the terms of the statute of 1849 to cast upon the plaintiffs in error the duty to complete the railway, and that there was no contract between the plaintiffs in error and the landowners which could be enforced by mandamus.— ED.

much relied upon before us in argument, we have, out of respect to his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported upon the ground that the railway Company, having exercised some of their powers, and made part of their line, are bound to make the whole railway authorized by their statutes.

It is unnecessary here to determine the abstract proposition, that a work, which before it is begun is permissive, is after it is begun obligatory. We desire not to be understood as assenting to the proposition of my brother ERLE, that "many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus." And, on the other hand, we do not say that such may not be the law. If a Company, empowered by Act of Parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving of consideration whether they ought to be indicted for a nuisance in obstructing the river, or for the non-performance of a duty for not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the act of the party. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue from no corrupt motives, but because Beverley has already sufficient railway communication, and because the residue of their line passes through a country thinly populated, and, if made, would not be remunerative.

But it is said that a railway Company are not in the situation of purchasers of land with liberty to convert it to any purpose, or to allow it to lie waste; that they are allowed to purchase it only for a railway; and, having acquired it under the compulsory powers of the Act, there must be an obligation on the Company to apply the land to that and to no other purpose. Subject to the qualification in the Act, this is undoubtedly true. Having acquired the lands of a particular landowner, the Company could not retain them by merely laying rails upon the lands so taken; and we agree that it never was intended that a landowner should be left with a high mound or a deep cutting running through his estate and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital might perhaps safely be left to the self-interest of the Company: but, if such a work were to be done, it would not be a practicable railway, and after five years the powers of the Act would expire and the land revest in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication; but in the meantime he would have

received full compensation for the market value of the land and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway, it must have available termini. When the statutes passed, all persons supposed that the termini would be York and Beverley; and, if the argument is well founded and the Company are bound by taking land on any portion of the railway to complete the whole line, it would seem to follow that one of the prosecutors, by compelling the Company to take his land on the line from Market Weighton to Cherry Burton, would thus entitle himself to a mandamus to compel them to make the line from Cherry Burton to Beverley, and, the Act having expired, to apply to Parliament for a renewal of their powers for that purpose. But, although the termini were originally intended to be York and Beverley, it is plain, the Legislature contemplated the possibility of the line being abandoned, or being only partially made, because in the one case the powers of the Act were to cease, and in the other they were partially continued. An option, therefore, is given to some one. By the course taken, the Court of Queen's Bench has exercised that option, and said the line shall be made, not to Beverley, but to Cherry Burton. In our opinion that option was left to the Company; and, the Company having *bonâ fide* made an available railway over the land taken, their obligation to the landowners has in this respect been fulfilled.

The cases upon this subject are very few: and the absence of authority is very striking, when we remember how many Acts have passed in *pari materiâ*, not only for railways but also for bridges and turnpike roads. Notwithstanding the numerous occasions in which such proceedings might have been taken, and the manifest interest of landowners to enforce their rights, no instance can be found of any indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord MANSFIELD determined this point in Rex v. The Proprietors of the Birmingham Canal, 2 W. Bl. 708; for he says: "The Act imports only an *authority* to the proprietors, not a *command:* They may desert or suspend the whole work, and *a fortiori* any part of it." On the other side, the language of Lord ELDON in Blakemore *v.* The Glamorganshire Canal Navigation, 1 Myl. & K. 162, is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in Regina *v.* The Eastern Counties Railway Company, 10 A. & E. 531 (E. C. L. R. vol. 37), and was inclined to act upon it and award a mandamus. The writ was subsequently withheld in that

case upon another ground; but Lord DENMAN seems to have been of opinion that upon a fitting occasion a mandamus ought to go. This, and the recent cases in the Queen's Bench now under discussion, are the only cases which bear upon the subject. We feel that Lord DENMAN and Lord CAMPBELL are high authorities upon this or any other matter, and are both equally entitled to the respect of this Court: but we are bound to pronounce our own judgment; and, after the most careful consideration, are of opinion that judgment ought to be for plaintiffs in error.

The result is, that the judgment of the Court below must be reversed.

Judgment reversed.[3]

THE KING *v.* THE SEVERN AND WYE RAILWAY CO.

2 Barn. & Ald. 646. 1819.[1]

W. E. TAUNTON had obtained a rule, calling upon the Severn and Wye Railway and Canal Company to shew cause why a writ of mandamus should not issue, directed to them, commanding them to reinstate, lay down again, and maintain part of a certain railway or tram-road, by them theretofore made under the authority of certain Acts of Parliament, from or near a place called Miry Stock to the summit of Churchway Engine, and which had been taken up and destroyed by the company. It appeared by the affidavits that the company had been incorporated by two Acts of Parliament, the 49 and 50 G. 3, and were empowered to make and maintain a railway or tramroad, passable for waggons and other carriages from and to certain places mentioned in the Act, and, among others, from or near a place called Miry Stock to the summit of Churchway Engine, in His Majesty's Forest of Dean; that they were empowered to raise money for that purpose, and to apply the same towards making and completing the railway, and to receive certain rates of tonnage for goods carried along the railway; and all persons were to have free liberty to pass upon and use the railways with waggons or other carriages, constructed as therein described, upon payment of the rates; and it was provided, that if the company did not complete the railway within three years, the Act was to be no longer in force. It appeared that the company did complete the railway within that time, and that they received tolls for the passage of carriages over that part of the railway

[3] See State of Minnesota *ex rel.* Atty. Genl. *v.* Southern Minn. R. R. Co. (1871), 18 Minn. 40.

[1] Arguments of counsel and concurring opinions of ABBOTT, C. J., and BAYLEY, J., are omitted.— ED.

which extended from Miry Stock to the summit of Churchway Engine, which part, for some time after the making of it, was used by the public, who experienced the convenience proposed by the promoters of the works. The affidavits then stated that the leading members of the company having become the owners of collieries situate on another branch of the rail-road, the company, a short time after the branches had been completed, for the purpose of preventing competition from the collieries communicating with that branch of the railway extending from Miry Stock to the summit of Churchway Engine, determined to render that branch of the rail-road impassable, and caused the iron tram-plates thereon, for a space of several hundred yards, to be taken up, and thereby destroyed that branch; whereby the public, and particularly persons possessing collieries in that part of the Forest of Dean which lies contiguous to the last-mentioned branch, had been deprived of the benefit of using that branch of the railway. The affidavits then stated that application had been made to the company to reinstate the tram-plates, but that they had refused so to do.

BEST, J. Both upon principle and authority I am of opinion, that the Court ought to grant this mandamus. Numerous applications are made to Parliament by speculative individuals, to form these navigable canals and railways: great public benefits are held out as an inducement to the Legislature to sanction these undertakings; and when their sanction is obtained, is it to be permitted to these persons to say, that they will do only that which is beneficial to themselves, and disregard entirely the interests of the public? It has been argued in this case, that there is a specific remedy by indictment, and that, therefore, we ought not to grant a mandamus. I think, however, that that objection ought not to prevail in this case, for an indictment does not afford a remedy equally effectual to compel the reinstating of the road, which is the purpose to be answered by the granting of this writ. The Court can only impose a fine, in case a corporation be convicted upon an indictment, and that fine may be levied by distress from time to time; and even then the corporation may elect not to repair the road; and at all events considerable delay would ensue. By mandamus, on the other hand, the defendants will be compelled to do the thing required, unless, by the return to the mandamus, they shew a sufficient reason for not doing it; and if they shew no such reason, then a peremptory mandamus issues; and, in case of non-compliance, an attachment may issue against those who disobey the writ. There being, therefore, no other remedy equally effectual to answer the purposes required, I think that we ought to grant a mandamus; and, consequently, that this rule ought to be made absolute.

FARMERS' LOAN AND TRUST CO. *v.* HENNING, RECEIVER OF LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD CO.

Fed. Cas. No. 4666. 1878.[1]

THIS was an application by the attorney-general of the state of Kansas for an order on [B. S. Henning] the receiver of the Leavenworth, Lawrence and Galveston Railroad Company to repair and operate said railroad to the city of Leavenworth, the initial point named in its charter. The railroad was in the hands of said receiver, who was appointed by this court in an action by the Farmers' Loan and Trust Company, trustee, to foreclose its mortgage against said railroad. The petition of the attorney-general recited the original and amended charters of said company, granted by the territory and state of Kansas, respectively, and dated February 12th, 1858, and February 29th, 1864, by which said company was authorized to construct, maintain and operate a railroad from Leavenworth, by the way of Lawrence, to the southern line of the state. Also, the grant of lands by the general government to the state of Kansas, to aid in the construction of said railroad, dated March 3d, 1863; the act of the legislature accepting said grant by the state, and transferring the same to the said railroad company, dated February 13th, 1864, and the acceptance by the company of the congressional grant and of the provisions of the said legislative act, dated March 12th, 1864, the state grant of one hundred and twenty-five thousand acres of land, to aid in the construction of said railroad, dated February 23d, 1866, and the acceptance of the same by the company, dated May 16th, 1866. Also, an act of the legislature changing the name of said company from the Leavenworth, Lawrence and Fort Gibson Railroad Company to the Leavenworth, Lawrence and Galveston Railroad Company, approved February 24th, 1866.

And the said petition further alleged that said railroad company did, in pursuance of its charter and agreements, construct, and since the year 1872 did operate and maintain its road, from a point of junction with the Kansas Pacific Railroad, on the north side of the Kansas river, opposite the city of Lawrence, to the south line of the state, and did, under an agreement with the Kansas Pacific Company, run its cars and transport its freight and passengers over said last-named railroad, from its junction therewith to and from the city of Leavenworth, thus making a continuous line from

[1] Part of the opinion is omitted.— ED.

said city, via Lawrence to the south line of the state. That said Henning was appointed receiver of said railroad by an order of this court on the 5th day of March, 1875, and that said receiver continued to operate and maintain said road, as aforesaid, until the 8th day of June, 1877. That since said last mentioned date said receiver has refused and neglected, and does still refuse and neglect, to operate said railroad from Lawrence to Leavenworth, or to run its cars for transporting freight and passengers to and from Leavenworth, under said agreement with the Kansas Pacific Company, and has abandoned said line of road, and refuses and neglects to maintain the bridge of said company across the Kansas river at Lawrence, and has permitted the same to remain unused and to go to decay, to the great damage of the commerce of the state, and especially of the cities of Leavenworth and Lawrence, and to the detriment of the traveling public; and praying for an order that said receiver be required to repair and maintain said railroad and bridge, and operate said road, as heretofore, from Leavenworth to Lawrence, and from thence to the southern line of the state, as provided by its said charter. To this petition the receiver filed a general demurrer.

Willard Davis, Atty. Gen., and H. B. Johnson, for the State.

Wallace Pratt and S. O. Thatcher, for respondent.

FOSTER, District Judge. The allegations of the petition standing confessed, and no question being made as to the form of the proceedings, the main question is to determine what obligations and duties the railroad company owes to the state, under its charter and the grants of land by the general government and the state, and the acceptance thereof by said company. And to these questions the arguments of counsel have been addressed, and have taken a wide range. It appears to be well supported by authority and reason that the powers and privileges granted by the charters of this company are permissive only, and not obligatory, and the company could elect whether it would proceed to exercise the franchises thereby granted, or whether it would not. And if it chose the latter course, the only penalty would be a forfeiture of the rights and privileges conferred. York & N. M. R. Co. *v.* The Queen, 1 El. & Bl. 858; State *v.* Southern Minnesota R. Co., 18 Minn. 40 [Gil. 21]; High, Extr. Leg. Rem. § 316. It was held by the court of exchequer chamber, in the case first above cited, that the mandamus would not lie to compel the company to exercise its franchises as to a part of the route named in its charter, and abandoned by the company when it had not actually proceeded to build or operate its road over the part abandoned, and no corrupt motives are imputed to the company, in abandoning the line.

But when the company has once built and operated its railroad between the points named in its charter, the case seems to stand on different grounds, and it seems the company may be compelled by mandamus to carry out the objects for which it was created, and to exercise its charter obligations. The following cases sustain and carry out this view: State *v.* Hartford & N. H. R. Co., 29 Conn. 538; King *v.* Severn & W. R. Co., 2 Barn. & Ald. 644; High, Extr. Leg. Rem. §§ 317, 319, 320; People *v.* Troy & B. R. Co., 37 How. Pr. 427; People *v.* Albany & V. R. Co., 24 N. Y. 261, 37 Barb. 216.

The case last cited has been referred to by defendants' counsel as a strong case in defendants' favor, and it is urged that the only remedy of the state is to take proceedings to annul and forfeit the franchises of the company. But upon examination of the case in 24 N. Y., it will be seen that the opposite doctrine is held by a majority of the judges. That proceeding was not by mandamus, but was a proceeding by the attorney-general for an injunction, and for the specific performance of the charter obligations of the company, and the main question to be decided was whether such a proceeding could be sustained. It is true Judge Wright, who delivered the opinion of the court, went farther, and not only argues that the action could not be maintained, but that by no proceeding could the company be compelled to keep up and operate its road, and that the only remedy the people had was indictment or proceedings to forfeit the franchise. But while all the judges concurred in the conclusion, *i. e.*, that the judgment of the supreme court dismissing the bill should be affirmed, four out of the six judges sitting in the case "however, were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchise. They agree that the remedy is not by action in equity for a specific performance, but by mandamus or indictment, or, at the election of the people, by proceeding to annul the existence of the corporation." So it is apparent this case is in point that the state may proceed, by mandamus, to compel the company to exercise its corporate powers when it has once constructed and operated its road. Having entered upon the exercise of its charter franchises it then owes a duty to the public which it may not, at its caprice, abandon. And in equity and good conscience the obligation is still greater where the company has been the recipient of land grants and subsidies to aid the construction of its road.[2]

[2] See State *v.* Hartford & N. H. R. R. Co. (1861), 29 Conn. 538; Talcott *v.* Township of Pine Grove (1872), 1 Flippin (Cir. Ct.), 120, 145; State *v.* Sioux City & P. R. R. Co. (1878), 7 Neb. 357; State *ex rel.* Grinsfelder *v.* Spokane St. Ry. Co. (1898), 19 Wash. 518; State *ex rel.* City of Bridge-

SAN ANTONIO STREET RAILWAY CO. *v.* STATE *ex rel.* ELMENDORF.

90 Tex. 520. 1897.[1]

GAINES, C. J. This case arose by a petition filed in the name of the state of Texas upon the relation of Henry Elmendorf and others to compel the plaintiff in error to operate a part of its lines upon which it had ceased to run its cars. Demurrers to the petition were overruled, and exceptions to the answer of respondent were sustained, and thereupon the peremptory writ was awarded as prayed for in the petition. This judgment was affirmed upon appeal, and to the judgment of affirmance this writ of error has been granted.

The first question is: Did the facts alleged authorize the relief prayed for in the petition? It was alleged that the respondent company was a corporation, chartered by a special act of the legislature passed May 2, 1874, and authorized to operate street railways in the city of San Antonio for the term of 50 years; that it applied to the city council of the city for authority to construct certain lines within the city limits, and that the privilege was granted by an ordinance, which is copied in the petition.[2]

It is not expressly averred that at the time the ordinance was passed the company had already constructed and had in operation a line or lines of street railway in the city; but we think that this is to be inferred from section 1, which speaks of the streets over which the privilege to construct and operate was thereby granted as "additional streets and avenues." It was further averred that the company had constructed, and for a time had operated, the line from its beginning point to Highland Park, but that, while it had continued to operate that portion of that line nearest the city, it had abandoned the operation of a part. The prayer was for a writ of mandamus to compel the respondent to operate that entire line.

It is a well-settled doctrine that a corporation may be compelled by the writ of mandamus to perform a duty imposed by statute. The duty need not be express; it may be implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed. But as to cor-

ton *v.* Bridgeton & M. T. Co. (1899), 62 N. J. L. 592; Thompson *v.* Schenectady Ry. Co. (1904), 131 Fed. 577; Paige *v.* Schenectady Ry. Co. (1904), 178 N. Y. 102, 114.

Compare Union Pac. R. R. Co. *v.* Hall (1875), 91 U. S. 343.

[1] Arguments of counsel and part of the opinion are omitted.— ED.

[2] The ordinance granted to the company the "rights, privileges and franchises" to operate a street railway in certain streets "during the term of their charter."— ED.

porations quasi-public in character — such, for example, as those chartered for the carriage of passengers and freight — there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication. But we have been unable to discover that any well-defined rule has been laid down by the authorities by which we may determine in every case what implied duties are assumed by such a corporation by the acceptance of its charter.[3]

The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case the proposed corporators may accept or not; and, in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act, and imposing it as an obligation to perform it, is to say that by reason of the public interest involved language is to have a different construction and effect from what it would have in statutes in general or in private contracts. Expressions may be found in the opinions of courts which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained upon sound principle. In legislating, the lawmaking power undertakes to determine what is to the interest of the public, and under the limitations of the constitution it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether quasi-public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed.

The allegations in the petition in this case show that the respondent company was chartered merely for the purpose of constructing and operating street railways in the city. The special act merely gave it the right of corporate existence for the purpose indicated. Tugwell *v.* Ferry Co., 74 Tex. 480, 9 S. W. 120, and 13

[3] The court then cited and commented upon Northern Ry. Co. *v.* Washington (1892), 142 U. S. 492; People *v.* Railway (1887), 104 N. Y. 58; State *v.* Railway (1885), 17 Neb. 647; People *v.* Railway (1889), 130 Ill. 175; York & N. M. Ry. Co. *v.* The Quenn (1853), 1 Ellis & Bl. 858; State *v.* Hartford & N. H. R. R. Co. (1861), 29 Conn. 538; City of Potwin Place *v.* Topeka Ry. Co. (1893), 51 Kan. 609; People *v.* Railway (1862), 24 N. Y. 261.— Ed.

S. W. 654. The streets were under the control of the city council. The company could do nothing without the consent of the council. The franchise in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance (which is quoted above) merely grants "the privilege" of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the franchise which imposed that obligation.

The following succinct and accurate statement of the law from Redfield on Railways has been often quoted with approval: "Where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no specific or adequate remedy, the writ of mandamus will be awarded." Redf. R. R. p. 678. It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason, and is in opposition, at least, to the weight of authority.

Of the numerous similar franchises granted in this state many have doubtless been abandoned, without objection, so far as we are advised, from any quarter. It does not follow that a just objection may not have been made; but the fact that none has been made serves, we think, in some measure to show that the practical construction of such charters has been that the grant is permissive and not obligatory.

We are of opinion also that the fact that the road has been constructed and operated, and that a part is now operated, makes no difference. Under the grant of a privilege to construct and maintain, if after acceptance it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can, against the will of the city, operate a part of its line, and not the

whole. A privilege to establish an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be, and for a failure to operate a part it would seem that the whole might be forfeited. It seems to us that the remedy in this case is to forfeit the franchise to operate the branch line in controversy. The defendant, in its answer, offers to discontinue the operation of the branch, and apparently this would have been a good answer to the petition if an answer had been necessary.

We would not be understood as holding that the common law does not impose some duties upon companies chartered as common carriers, which may be enforced by mandamus, although no mention of such duties may be found in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public; but certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so, and we see no good reason why corporations may not discontinue their enterprises when the charter does not in express terms or by fair implication forbid it. If it is the will of the legislature, or of a municipal body to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention.

It follows that, in our opinion, the trial court erred in overruling the demurrer to the petition, and that the court of civil appeals erred in not so holding. It not appearing that that petition may be amended so as to state a good cause of action, the judgment of the court of civil appeals and that of the district court are reversed, and the cause dismissed.[4]

PEOPLE *v.* ROME, WATERTOWN AND OGDENSBURGH RAILROAD CO.

103 N. Y. 95. 1886.[1]

EARLE, J. We are left, therefore, to determine simply whether, upon the facts which we must assume to exist in this case, the defendant ought, in the public interest, as an absolute duty, to be

[4] See State *ex rel*, Knight v. Helena P. & L. Co. (1899), 22 Ont. 301.

[1] The statement of the facts is omitted as they sufficiently appear from the opinion. Arguments of counsel and part of the opinion are also omitted. — ED.

compelled to rebuild, maintain and operate the small section of road which it abandoned. We have not here the question which would have to be determined if the Syracuse and Northern Railroad Company were still in existence and had abandoned the portion of its road between the Pulaski station and Washingtonville station, so that passengers and freight were carried only to and from the former station. But we have a case where the defendant has succeeded to all the rights and obligations of that railroad company, and the question is, whether it is discharging the duty to the public imposed upon it by the consolidation of that railroad company with it. After the consolidation it had two lines from Pulaski station to Washingtonville, a direct line about seven miles long and a circuitous line by way of Richland about two miles longer. It was not absolutely bound in law to stop any of its trains at the village of Pulaski or the village of Sandy Creek. It would have discharged its whole duty by running its trains through from the Pulaski station to the Washingtonville station without stopping. It would cost it more than $15,000 annually to maintain and operate its direct road from Pulaski station to Washingtonville station without adding $1 to its income.

It could accommodate every passenger and every pound of freight at Washingtonville station or at the Pulaski station by carrying it over a line which it owned by way of Richland. Did it not thus substantially perform the duty which devolved upon it as the successor of the Syracuse and Northern Railroad Company? It carried all passengers and freight from Washingtonville to Pulaski station and Syracuse, and all passengers and freight from Syracuse and Pulaski station to the terminus of the Syracuse and Northern Railroad at Washingtonville. How can it be said that it owed a duty to the public to do this over the direct line rather than over a line near by but two miles longer? There is no allegation that any considerable number of people are discommoded, and it does not appear that a single person suffers any harm except that passengers are obliged to change cars at Richland rather than at Washingtonville station, and persons taking the cars at Washingtonville station to go southerly are obliged to travel about two miles farther. But we must take the facts as stated in the affidavits of the defendant's manager, read in opposition to the application for the writ, that it is not true that the abandonment of this small section of road has been and continues to be a matter of serious damage to the people of the State of New York, or especially to that portion of the people of the State who are residents and tax payers of the town of Sandy Creek, but that the present line operated by the defendant between Washingtonville station and Pulaski station fur-

nishes greatly increased facilities to the people of the State of New York as well as to the people of the town of Sandy Creek above those which were enjoyed at the time of the abandonment; that it is now far more convenient for the people of that town to reach their principal markets, the cities of Oswego, Watertown, Syracuse and Rome, than at any previous time, and that their railroad service is altogether more efficient and convenient than it was previous to the time of the abandonment. Under such circumstances we see no reason for saying that the interests of the people have suffered from this abandonment, or that any considerable number of the people of this State were thereby in any way injured or inconvenienced. If a few individuals were discommoded, or private interests were in any way injured, this writ is not the proper remedy for such evils.

We have, with great care, examined and considered the numerous authorities cited on behalf of the people in support of this writ, but we find none which justify it. Several cases were cited in which it was held that a railroad company could be compelled by *mandamus* to operate its railroad to the terminus specified in its charter. (Farmers' Loan and Trust Co. *v.* Henning as Receiver, etc., 17 Am. Law Reg. [N. S.] 266; State *v.* H. & N. H. R. R. Co., 29 Conn. 538; Un. Pac. R. R. Co. *v.* Hall, 91 U. S. 343; King *v.* S. & W. R. R. Co., 2 B. & Ald. 646; People *v.* Albany & Vermont R. R. Co., 24 N. Y. 261.) But the principles of those cases are not controlling in this, because here the railroad service is kept up between the termini of the Syracuse and Northern Railroad, and the public duty which devolved upon it at its organization is fully and substantially performed by the defendant. The present line is a little longer than the one originally adopted and slightly varying therefrom, but it accommodates the people of the State and the people of the locality substantially as well as the line originally adopted. Suppose two roads were consolidated and the lines of the two between two places were parallel and near to each other, could the consolidated road be compelled by mandamus to operate both lines, or could it discharge its duty to the public by using only one line? Suppose the New York Central and the West Shore roads, as their lines approach the city of Buffalo, were parallel to and near each other, could not the New York Central, which is now substantially the owner of both roads, abandon the West Shore line, and run into the city of Buffalo upon the New York Central line? We do not determine that in all cases where a railroad company which, by consolidation, has become the owner of two lines of road between two termini, and running through different sections of country and different cities or villages, like the two lines between

Syracuse and Rochester, could abandon either of its lines, because in such cases it might well be that the public interests and the accommodation of a large portion of the people of the State required that both lines should be operated; but where a railroad company owns by consolidation two lines of road, and can substantially accommodate the people of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, we do not believe it should be compelled by mandamus to operate both lines at a great sacrifice of money upon the fanciful idea that the sovereignty of the State is wounded by its omission to operate both lines.

The defendant does not run its cars at any point where it has not the right to, and it does not exercise any franchise which it is not authorized to. It accommodates all the travel and traffic which the Syracuse and Northern Railroad Company was required to accommodate. That road still has a connection with the defendant; and all the travel and traffic over it can still commence and terminate at Washingtonville. There is no public right to protect and no public duty to enforce by mandamus.

We are, therefore, of opinion that the orders of the General and Special Terms should be reversed, and the application for a peremptory writ of mandamus denied, with costs.

All concur, except ANDREWS, J., who takes no part, and MILLER, J., absent.

Ordered accordingly.[2]

EAST OHIO GAS CO. *v.* CITY OF AKRON.

81 Ohio St. 33. 1909.[1]

DAVIS, J. This case was orally argued and submitted six months ago; but, on account of its great importance to the public as well as to all public service corporations, we have given it unusual consideration, and we have reached our conclusions only after most careful deliberation.

The chief question for solution here is whether the plaintiff in error may, under the circumstances disclosed in the record, discontinue the furnishing of gas to the city of Akron and its inhabitants

[2] See Commonwealth *v.* Fitchburg R. R. Co. (1858), 12 Gray, 180; Moore *v.* Brooklyn City R. R. Co. (1888), 108 N. Y. 98; City of Potwin Place *v.* Topeka Ry. Co. (1893), 51 Kan. 609.

Compare Ohio & M. Ry. Co. *v.* People (1887), 120 Ill. 200; Savannah & O. Canal Co. *v.* Shuman (1893), 91 Ga. 400; State *v.* Dodge City, M. & T. Ry. Co. (1894), 53 Kan. 329.

[1] The statements of facts, arguments of counsel, and part of the opinion are omitted.— ED.

and take away from the streets its mains and pipes, and, in short, its whole plant.

Whether a contract for the privilege of entering the streets of the city was necessary to the plaintiff in error, or whether the defendant in error was competent to make it, is immaterial in this case. The consent of the city for that purpose was granted by the ordinance, and it was accepted by the gas company; but no stipulation was made and accepted as to the time when the use of the streets for the purposes of the gas company should end. The language of the ordinance is: "That the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, . . . to maintain, operate, repair and remove mains and pipes . . . together with the right to construct and maintain, repair and remove all necessary regulators," etc. Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But, if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion. This court laid it down as the law, in Railroad Company *v.* Defiance, 52 Ohio St. 262, 307, 40 N. E. 89, 100, that: "Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restriction of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant." The doctrine, as well as the judgment, in this case was affirmed in Wabash R. R. Co. *v.* Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87. The same rule of construction was approved and followed in Blair *v.* Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, and in Cleveland Electric Ry. Co. *v.* Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

It comes, then, to this: That, in the absence of limitations as to time, the termination of the franchise is indefinite, and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto.

This is in accord with the judgment of this court in Gas Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60. The question there was whether section 2478, Rev. St. 1880, could be applied to a company organized under the old Constitution and which was endeavoring to disconnect its pipes from the street lamps and city buildings, but was at the same time continuing to supply the private consumers with gas. The question whether the gas company might wholly quit business in the city, and withdraw by disconnecting and taking up its pipe lines, was not in the case and was not considered. A reference to the twin case of Zanesville *v.* Gas Light Co., 47 Ohio St. 1, 10, 23 N. E. 55, 58, will disclose the fact that, by the ordinance under which the Zanesville Gas Light Company obtained the privilege to lay its pipes in the streets and alleys of Zanesville, it was expressly provided that: "The Zanesville Gas Light Company shall during such time as they enjoy the privileges granted by this ordinance supply the town council with such quantities of gas as may be by them required for public lamps at a price not exceeding," etc. Therefore, when it was held in Zanesville *v.* Gas Light Co., *supra,* that the price of gas might be controlled by section 2478, Rev. St. 1880, it followed as held in Gas Light Co. *v.* Zanesville, *supra,* that, if the gas company refused to obey the second ordinance regulating the price, it might be compelled by mandatory injunction to do so, "so long as it continues to exercise and enjoy its franchises as a gas company," which franchises were to be a gas company in Zanesville only. If the East Ohio Gas Company were insisting upon a right to furnish gas to some of its patrons in Akron and at the same time refusing to do the same service to others, it is not doubted that the doctrine of the Zanesville case would receive great consideration, notwithstanding that the original Akron ordinance does not contain the controlling provision which is found in the Zanesville ordinance. But that is not this case.[2]

[2] See Laighton *v.* City of Carthage (1909), 175 Fed. 145.
Compare Selectmen of Amesbury *v.* Citizens El. St. Ry. Co. (1908), 199 Mass. 394.
In Turnpike Co. *v.* Illinois (1877), 96 U. S. 63, it was held that a grant of a franchise, without expressing any length of time for which it should be enjoyed, should be considered a grant for the life of the corporation. In People *v.* O'Brien (1888), 111 N. Y. 1, such a grant was held to be in perpetuity.

CITY OF GAINESVILLE *v.* GAINESVILLE GAS AND ELECTRIC POWER CO.

65 Fla. 404. 1913.[1]

WHITFIELD, J. The city of Gainesville obtained an injunction restraining the Gas & Electric Company "from closing down or discontinuing its public service business" of furnishing electricity to the city and its inhabitants. A demurrer to the bill of complaint was interposed. This appeal is from an order "that the injunction be and the same is dissolved, with the right of the complainant to amend the bill in ten days from this date or the bill may be dismissed without prejudice to such other action as the complainant may be advised is proper." The question to be determined is whether there was error in dissolving the injunction.

The bill of complaint alleges, in effect: That the municipality has all the usual powers of cities in this state, and is authorized "to provide for the lighting of the streets of said city and to provide for the lighting of the said city by gas and other illuminating material and to do and perform all such other acts as shall seem necessary and best adapted to the improvement and general interest of said city, or as shall be necessary for the health, convenience and safety of its citizens;" that a charter was granted by the state to the defendant as a corporation, authorizing the corporation to exist for 99 years and, among other things, to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes; such business to be engaged in in the city of Gainesville; that thereafter the company erected "and constructed within the corporate limits of said city of Gainesville an electric lighting and power plant and, by and with the permission of said city aforesaid, erected and constructed its poles and wire for the distribution of electric current over and along a large number of the streets of said city, and from that date until the present time has been continuously engaged in the manufacture and sale of electricity for illuminating and power purposes."

The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public. State *ex rel.* Ellis *v.* Tampa Waterworks Co., 57 Fla. 533, text 539, 48 South. 639, 22 L. R. A. (N. S.) 680.

A corporation engaged in furnishing electricity to a municipality or its inhabitants and using public streets or exercising other franchises or privileges in doing so is thereby performing services of

[1] Part of the opinion is omitted.— ED.

a public nature, within the meaning of the Constitution and laws of this state, and such a corporation is subject to lawful governmental regulations to enforce its duties to the public it undertakes to serve. Such a corporation is manifestly a "public service" or "public utility" corporation, and is subject to the rules of law applicable to corporations or companies engaged in performing or rendering service of a public nature. See 1 Wyman, Pub. Ser. Cor. § 113.

As the gas and electric company had received and accepted from the state a corporate charter authorizing it to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes to the municipality and its inhabitants, and had by and with the permission of the city constructed its plant using the streets of the city for its poles and wire by means of which the public service of furnishing electric current to the city and its inhabitants for lighting and power purposes was performed, for which the company was entitled under the Constitution and laws of this state to receive a reasonable compensation in return for service rendered, the company assumed the duty imposed by implication of law to render a reasonably adequate service during the time its rights and duty may lawfully continue, and such duty may be enforced where no adequate excuse for nonperformance is appropriately known. See Gas Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60. An express contract is not essential to establish reciprocal rights between a public service company and the public it undertakes to serve. Such rights arise by implication of law. See State *ex rel.* Ellis *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 South, 213, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359.

The defense undertaken to be shown when the injunction was dissolved is in substance that the ordinances passed by the city regulating the company's service and compensation are in effect confiscatory and unduly arbitrary and burdensome to the company. This is not a sufficient reason for a discontinuance of the public service. While it is the duty of the company to observe all lawful municipal regulations, the company has a right to receive a reasonable compensation for the public service it renders to the city and its inhabitants and to the equal protection of the laws in every department of the government. If the regulations imposed by the city are in law and in fact illegal for any reason, the company has its complete and adequate remedy by appropriate proceedings; but the company, being engaged in rendering a public service, must continue to do so in a reasonably adequate manner until relieved of its duty by due process of law. Illegal municipal regulations are not binding; but persons and corporations cannot be permitted

to arbitrarily assume to remedy an alleged wrong by refusing to render a public service voluntarily undertaken. The service to the public must be performed, and the law will upon proper proceedings enforce the right to reasonable compensation for service rendered. An ordinary action at law would not afford an adequate remedy to the public. Under the liberal rules of procedure recognized in this state, the company may by cross-bill or other appropriate steps secure a determination and enforcement of its right to reasonable compensation and to equal protection of the laws.

The decree dissolving the injunction is reversed, and the cause is remanded, with directions to retain the bill of complaint for the purposes of appropriate injunction orders, with leave to the defendant company by cross-bill or other procedure to test the validity of the municipal regulations of which it complains.[2]

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

CUMBERLAND TELEPHONE AND TELEGRAPH CO. *v.* CITY OF EVANSVILLE.

127 Fed. 187. 1903.[1]

ANDERSON, District Judge. It is alleged in the bill that prior to December, 1882, the Evansville Telephone Exchange was organized under the laws of the state of Indiana "for the purpose of conducting a telephone business in the city of Evansville, Indiana"; that on December 11, 1882, said Evansville Telephone Exchange made application to the common council of the city of Evansville for a permission or grant to occupy the streets, alleys, and public places in the city in order to erect its poles and string its wires for use in its telephone system, and on December 28, 1882, an ordinance was duly passed by said common council granting such right to said telephone exchange, its successors and assigns; that thereupon said telephone exchange, pursuant to such grant, erected and established a telephone system in said city, and on July 1, 1883, had 527 subscribers who were receiving service from said exchange; that on June 30, 1883, complainant purchased of the Evansville Telephone Exchange its telephone plant in the city of Evansville, together with all poles, wires, exchange equipment, and other ap-

[2] See Matter of Wheeler (1909), 62 Misc. (N. Y.) 37, with which compare Carter *v.* Commonwealth (1823), 2 Va. Cas. 354.
With regard to the question whether injunction is the proper form of action, see Germania Ref. Co. *v.* Alum Rock Gas Co. (1910), 226 Pa. St. 433.

[1] Only the statement of the pleadings is here reprinted from the opinion delivered upon the trial.— ED.

pliances, and also the right and permission given by the common council of said city to operate said exchange in said city; that complainant immediately took possession of said property, and has been in possession and enjoyment thereof continuously to the present time, and has continuously since, without cessation, operated said exchange under said ordinance; that the passage of the said ordinance of 1882 and its acceptance by the Evansville Telephone Exchange constituted a contract between the city and the Evansville Telephone Exchange, which was duly and properly acquired by complainant, and that complainant thereby acquired vested rights to the use of the streets and alleys of the city of Evansville for the erection and maintenance of its poles and wires used in the operation of its telephone plant in said city, which cannot lawfully be interfered with; that defendant has ordered and directed complainant to remove all telephones furnished by it to the city, and to remove from the streets, alleys, and public places and property of said city all poles, wires, cables, fixtures, and appliances of any kind of complainant which are now in or upon said streets, alleys, public places, and property of said city; and complainant seeks to enjoin the defendant from interfering with the property or business of complainant in said city and from interfering in any manner with its right to erect and maintain its poles and wires in the streets, alleys, and public places of the city, or with its vested rights in said city. The bill is quite lengthy, and contains many other matters besides those recited above, but by it complainant claims the right to remain and do business in the city by virtue of the ordinance granted by said city to said the Evansville Telephone Exchange on December 28, 1882, and by said exchange assigned and transferred to complainant in June, 1883.

The answer, among other things, alleges that the attempted sale and transfer by the Evansville Telephone Exchange to the complainant of all its property of every kind, including its rights and franchises, was illegal and void because it was beyond and outside of the powers granted to said telephone exchange, and contrary to public policy; that, the attempted sale and transfer of all its property being absolutely void, complainant has no right or title to the same by reason of such sale and transfer, and therefore cannot claim the protection of a court of equity for such property.

On Petition for a Rehearing.

(January 22, 1904.)

Anderson, District Judge. The complainant has filed a petition for a rehearing of this cause, and in support thereof has filed

a brief which warrants some attention. It is correctly stated in this brief that "the only piece of property involved in this suit is the 'easement' created under the 1882 ordinance," and assigned to complainant, and that "the sole property right in suit is this easement." The question now is, did the complainant, by the sale alleged and proved in this case, acquire a right in or title to the easement which it can assert in a court of justice? In their brief counsel for complainant treat the contract upon which they base complainant's title to the "easement" as ultra vires the Evansville Telephone Exchange, and in that respect void. But this view is too narrow. The contract was void also because it was contrary to public policy. In Thomas *v.* Railroad Company, 101 U. S. 71, 83, 25 L. Ed. 950, the court said:

"There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of ultra vires, as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In Central Transportation Company *v.* Pullman's Company, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, it is said:

"The necessary conclusion from these premises is that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the Legislature, and because it involved an abandonment by the plaintiff of its duty to the public."

In Pullman's Car Co. *v.* Transportation Co., 171 U. S. 138, 149, 18 Sup. Ct. 808, 43 L. Ed. 108, the court said:

"The so-called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24 [11 Sup. Ct. 478, 35 L. Ed. 55]. The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the Legislature, and because it involved an abandonment by that company of its duty to the public."

Complainant's counsel confuse the words "void" and "voidable." Such confusion has frequently occurred in statutes and de-

cisions of courts, but in the cases cited in the original opinion herein the Supreme Court of the United States used the word "void" in its strict and proper sense; and in the case of Central Tranportation Co. *v.* Pullman's Co., *supra,* in the paragraph quoted in the original opinion, the court held the contract in that case to be "not voidable only, but wholly void, and of no legal effect." "Contracts to do acts that are illegal, criminal, or contrary to public policy . . . are absolutely void." Am. & Eng. Ency. of Law, vol. 28, p. 477.

In Anderson *v.* Roberts, 18 Johns. 527, 9 Am. Dec. 235, it is said: "A thing is void which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done."

In Thomas *v.* Railroad Co., *supra,* the court not only holds that the company entering into the contract in that case had the right to repudiate the contract, but that "it was the duty of the company to rescind or abandon it at the earliest moment." And this because the contract was against the law; forbidden by public policy.

I think the contract which is the foundation of complainant's alleged title is absolutely void. "Strictly speaking, 'void' means without legal efficacy; ineffectual to bind parties or to convey or support a right." 28 Am. & Eng. Ency. of Law, 473. No right can be founded on an absolutely void act. "Whatever may be avoided, may, in good sense, to this purpose, be called void; and this use of the word 'void' is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons the distinction is highly important, because nothing can be founded on what is absolutely void, whereas from those which are only voidable fair titles may flow." Somes *v.* Brewer, 2 Pick. (Mass.) 184, 13 Am. Dec. 406. Complainant is in this position: It claims title by virtue of a contract which is absolutely void because in violation of positive law, and it asks this court to recognize and protect a title thus acquired. "No court of justice can, in its nature, be made the handmaid of iniquity." U. S. Bank *v.* Owens, 2 Pet. 538, 7 L. Ed. 508. Lord Mansfield, in Holman *v.* Johnson, Cowp. 341, stated the ground on which courts proceed in such cases, as follows:

"The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is

upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

In Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 410, 9 Sup. Ct. 553, 32 L. Ed. 979, the court quotes from Bishop on Contracts:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law."

In Pullman's Car Co. *v.* Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, after citing with approval the case of Holman *v.* Johnson, 1 Cowp. 341, and many other cases, the court said:

"They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of the courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not, in such endeavor, permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

How can complainant claim the protection of this court for its alleged title to this easement without having recourse to the contract by which it claims to have acquired that title? To grant the relief sought by complainant is to both recognize and enforce a contract which the law declares to be absolutely void; void because of want of power to make it, and void because contrary to public policy.

It is insisted that the city of Evansville occupies the position of a third person or stranger to this contract, and therefore it cannot raise the question as to its validity. As the authorities cited above show, if this contract is absolutely void, it is void as to everybody, and is a nullity whenever or wherever it is set up. The right asserted here by complainant is the right to use the streets, alleys, and public places of the city. The regulation and control of this use is by law vested in the city. The complainant is asserting the right to this use against the city, which now has control of the right, unless it has granted it to a corporation which has legally assigned it to complainant. It would be strange, indeed, if in such case the city could not question the validity of such assignment.

But it is the duty of courts to refuse recognition to an illegal contract whenever and however its illegality appears. A court is, in the due administration of justice, bound to refuse its aid to enforce an illegal contract, even if its invalidity be not pleaded. Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539. A party to the contract cannot waive its invalidity. In Hall *v.* Coppell, 7 Wall. 542, 559, 19 L. Ed. 244, Mr. Justice Swayne, speaking for the court, said:

"The instruction given to the jury that, if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

In order to establish its claim to the right sought to be protected in this case, complainant alleged, and it was necessary for it to prove, the contract out of which its alleged right springs. In this way, and in this way alone, can it establish the right alleged in the bill. In McMullen *v.* Hoffman, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, the Supreme Court said:

"The authorities, from the earliest time to the present, unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

The petition to rehear is overruled.[2]

[2] See Abbott *v.* Johnston, G. & K. H. R. R. Co. (1880), 80 N. Y. 27; McCarter *v.* Vineland L. & P. Co. (1907), 72 N. J. Eq. 767; Oregon *v.* Portland Gen. El. Co. (1908), 52 Oreg. 502.

Compare Plummer *v.* Chesapeake & O. Ry. Co. (1911), 143 Ky. 102; Attorney General *v.* Haverhill G. L. Co. (1913), 215 Mass. 394.

LUSBY *v.* KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD CO.

73 Miss. 360. 1895.[1]

WOODS, J. This action was instituted by the appellant in the circuit court of Monroe county for the recovery, in one of the counts of the declaration, for actual damages, and, in the other count, for the statutory penalty for trespass in cutting trees upon appellant's land. The count for the actual damages was, by the appellant, dismissed in the court below, whereby the right to recover the statutory penalty for the cutting of trees was left as the sole issue to be determined.

Brushing aside all the mere forms of pleadings adopted by the parties in reaching and raising this issue, we state at once the defense set up by the appellee, which was, and is, in a word, that because of certain other suits, begun by the appellant and others, against appellee, to recover for injuries sustained by them in the flooding of their lands and destroying their crops, and because, as alleged by them in their complaints, of the improper construction of appellee's line of railway, it became, in the judgment of appellee, necessary to make fresh surveys over appellant's lands, with a view to a change and relocation of said line, if, after such surveys, it should appear to be necessary to reconstruct or relocate its line of railway, and this right to resurvey and change and relocate is asserted to be contained in the grant of its powers contained in the charter.

It thus appears that the great, underlying question presented is, was the original selection and location of the route, and the actual construction of the railroad in its entirety, many years ago, final, and was the power to exercise the right of eminent domain exhausted by the one exercise of it, in such original selection and location of the route and the actual construction of the road?

In no part of the charter, either as recited by us or elsewhere, is there to be found any express grant of any powers to reselect or relocate the line after the most advantageous route has been once adopted, nor any hint of power conferred to change the route shown to have been located and selected by the map required to be filed in the office of the secretary of state, and to reconstruct the line, in whole or in part, on any other route, slightly or widely different and distant from the original line of selection and location, and actual construction of the road. If any such power to

[1] Arguments of counsel and part of the opinion are omitted.— ED.

relocate and reconstruct can be successfully asserted by the corporation, resort must be had to the doctrine of implied powers.

It will be well to recur, for a moment, to first principles, and remind ourselves that all grants of power — and preëminently grants of powers of sovereignty — to private corporations are to be strictly construed; that every doubt as to the proper construction of every such grant is to be resolved against the grantee; and that, to quote the language of the great English judge, widely borrowed and approved, "silence is negation." Thus guarded, it may be safely and wisely conceded that one original act of selection, location, and construction would not exhaust the power to exercise the right of eminent domain in those two exceptional classes of cases where a subsequent exercise of the right is shown clearly to be necessary to subserve the very ends for which the corporation was created. The first of these classes recognized by us in Ewing *v.* Railway Co., 68 Miss. 551, 9 South. 295, and recognized by courts generally, are cases in which the ends of the corporation's being imperatively required, not a second condemnation of a new line, and the relocation and reconstruction of another and different line of railway, but the securing of additional terminal facilities for turntables, sidetracks, water tanks, station houses, etc. Referring to cases of this character, we said in that case: "We do not forget that grants of power, of the character under consideration, are to be strictly construed. But that is not a strict construction which denies to the agency created the very means which are indispensable to the accomplishment of the ends of the creation. That is the destruction of the agency, and not a construction of the grant of the powers conferred."

The second class of exceptional cases arises when, not by consideration of the corporation's convenience, or of economy in the expenditure of its moneys, or of a more advantageous location, and reconstruction on a new and different line, but by imperious necessity, some change of the line must be made, or the road abandoned, and the ends of its creation fail of fulfillment because of some insurmountable obstacle interposed by nature to the further operation of the road on its original line. If some appalling cataclysm should swallow in a yawning chasm the right of way, roadbed, and track, and leave a bridgeless gulf where solid earth had been, then, in this and other like cases, the deviation of the line from its original location would be within the implied powers of the charter, because to relocate and reconstruct to the extent indicated would be absolutely necessary in order to the accomplishment of the ends for which the corporation was created.

But these classes of cases do not embrace the case presented by

the present appeal. Here, in the case at hand, no uncontrollable and not to be foreseen convulsion of the earth had rendered the continued use of the line impossible, nor was there any overpowering necessity which required a new location and reconstruction of the road. It does not appear that, as originally located and constructed, the line was not, as the selection and location by appellee declared it to be, by its original action, the most advantageous route. But, if the location was not the most advantageous, and if damage had resulted to lands and crops by reason of improper location, yet we are at a loss to conjecture why sufficient culverts, trestles, and bridges for the passage of the flood waters would not have prevented such damage, and, in addition, and chiefly, the corporation, having once made its election, and constructed and for years used its road according to such election, is bound thereby. Having elected to take its original route, such election is final, and no change, from motives of convenience or expediency or economy, could be made, without another legislative grant authorizing the change.

It would be amazing, if any high authority could now be found, holding that a corporation, under such a charter as that of appellee, could continue indefinitely to exercise the state's sovereign right of eminent domain whenever and wherever it would be more advantageous to it to change, relocate, and reconstruct an established and long-used line of railway, than to stand by its original selection, location, and construction. In a few earlier cases there are intimations not in harmony, apparently, with the views we have advanced. Perhaps the case most cited for the false view is that of Railroad Co. *v.* Devaney, in the book entitled 42 Miss. at page 555. The case has no binding authority upon us, nor does the doctrine of *stare decisis* have any application in the case referred to, nor in any other case found in the so-called 42 Miss. The opinions found in that volume are the utterances of a tribunal appointed by the military satrap, who then ruled in a prostrate commonwealth, and have no other binding authority upon us than that each case therein must be regarded as *res adjudicata.*

In that case, an unsuccessful railroad company having had a bridge burned across a small stream, the Yallobusha river by name, and having no money (a very common condition with men, and not wholly unknown with corporations) with which to build, abandoned its line, long before located and constructed and operated, seized Devaney's lands, to the extent of a right of way, changed the location of its once-selected and long-used line, and all on the ground of its poverty,— its want of funds to rebuild its burned bridge; and the tribunal of military appointment held that there was mani-

fest necessity, requiring a change of location and reconstruction of the railway line. The opinion is unsound, mischievous, and at war with reason and authority.

In turning to the text writers and decided cases which hold that, where the road has been once located and constructed, in the exercise of the discretion allowed its promoters by charter, or by general law, the power of exercising the right of eminent domain is at an end, and that no second choice can be made, or any different line selected, unless expressly authorized by statute, the array is multitudinous. Time fails us in any citations from them, and we content ourselves by a simple reference to some of them. See Mills, Em. Dom. 58; Rand. Em. Dom. 160; Pierce, R. R. 254; 2 Wood, Ry. Law, p. 752; Society *v.* Hosmer, 12 Conn. 361; State *v.* New Haven & Northampton Co., 45 Conn. 331; Providence & W. R. Co., Petitioner, 17 R. I. 324, 21 Atl. 965; Brigham *v.* Railroad Co., 1 Allen, 316; Mason *v.* Railroad Co., 35 Barb. 373; *In re* Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601; Hudson & D. Canal Co. *v.* New York & E. R. Co., 9 Paige, 323; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. Law, 205; Morrow *v.* Com. 48 Pa. St. 305; Com. *v.* Pittston Ferry Bridge Co., 148 Pa. St. 621, 24 Atl. 87; Moorhead *v.* Little Miami R. Co., 17 Ohio, 340; Atkinson *v.* Railroad Co., 15 Ohio St. 21; Kenton County Court *v.* Bank Lick Turnpike Co., 10 Bush, 529.

We have already declared that the opinion of the tribunal created, not by our constitution and laws, but by a military governor of a subjugated state, is not authoritative upon us, and the doctrine of *stare decisis* does not apply; but, as appellee relied upon it, and naturally and properly, as being *res adjudicata* in cutting the timber, as alleged by appellant in his complaint, the trespass cannot be regarded as willful or malicious, and appellant was only entitled to actual damages. Having dismissed his demand for actual damages, and not being entitled to the statutory penalty for a willful trespass, we feel constrained to affirm the judgment of the court below.

We have not thought it necessary to examine and pass upon the action of the court below upon the pleadings generally; but it may be proper to say that the demurrers to the plaintiff's replication and his amended replication to defendant's second plea were properly sustained. Affirmed.

STATE *ex rel.* SNYDER *v.* PORTLAND NATURAL GAS AND OIL CO.

153 Ind. 483. 1899.[1]

JORDAN, C. J. This is a proceeding in quo warranto by the state of Indiana, on the relation of the prosecuting attorney of the twenty-sixth judicial circuit, to dissolve, and seize the corporate franchises of, appellee. The venue of the cause was changed from the Jay circuit court to the Randolph circuit court, in which court a demurrer was sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The state appeals, and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information is not a model pleading, and may perhaps be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision, is, are the facts as therein alleged sufficient to entitle the state to demand that the appellee's corporate franchises shall be declared forfeited?

Reduced to a simple proposition, the gravamen upon which it bases its demand for a forfeiture of the defendant's corporate rights is that it has, by an agreement, illegally united with the Citizens' Gas, etc., Company, a competing company, under which agreement the price of gas to be charged consumers has been fixed, and has agreed with said company that neither would furnish gas to persons who were patrons of the other company. By this agreement it appears that it was controlled, and at all times refused to furnish its product to divers inhabitants of the city of Portland, simply because they were consumers of gas from the lines of the Citizens' Gas Company.

The insistence of counsel for the state is that the defendant, under the facts charged in the information, is shown to have combined with the Citizens' Gas Company to fix and maintain the price of gas, and that these companies agreed with each other not to furnish gas to consumers who were patrons of the other company, in order to prevent legitimate competition; that, in carrying out the compact or agreement, the defendant exercised powers not conferred by law, and committed an act violative of law, and is shown to have abused the rights conferred upon it by the state, and hence it ought to be ousted from longer or further exercising its corporate rights.

[1] Part of the opinion is omitted.— ED.

The Code provides that an information may be filed against a corporation when it does or omits acts which amount to a surrender or forfeiture of its rights and privileges as a corporation, or when it exercises powers not conferred by law. Burns' Rev. St. 1894 § 1145 (Rev. St. 1881, § 1131; Horner's Rev. St. 1897, § 1131, subd. 4). The statute enacts that the information "shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court." Burns' Rev. St. 1894, § 1147 (Rev. St. 1881, § 1133; Horner's Rev. St. 1897, § 1133).

The authorities assert, as a general rule, that courts will proceed with extreme caution in the forfeiture of corporate franchises, and a corporation will not be deprived thereof unless under express limitation, or for a plain abuse of its powers, whereby it fails to fulfill the design and purpose of its organization. When the state seeks to destroy the life of an incorporated body, it is required to show some grave misconduct,— some act, at least, by which it has offended the law of its creation, or something material which tends to produce injury to the public, and not merely that which affects only private interests, for which other adequate remedies are provided. High, Extr. Rem. §§ 649, 654; People *v.* North River Sugar-Refining Co., 121 N. Y. 582, 24 N. E. 832; Bank of Vincennes *v.* State, I Blackf. 267. Where, however, the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, it thereby may be said to offend against the law of its creation, and consequently forfeits its right to longer exercise its franchises, and is subject to a judgment of ouster. People *v.* North River Sugar-Refining Co., 54 Hun, 354, 7 N. Y. Supp. 406, and 121 N. Y. 582, 24 N. E. 832; State *v.* Oberlin Bldg. & Loan Ass'n. 35 Ohio St. 258; State *v.* Cincinnati, N. O. & T. P. Ry. Co., 47 Ohio St. 130, 23 N. E. 928; State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279; High Extr. Rem. § 666.

Courts have enlarged the rule so that an information in the nature of a quo warranto is now regarded not only as appropriate means of testing the right to exercise corporate franchises, but such proceedings are also a proper remedy for the abuse by a corporation of the powers with which it has been invested. Beach, Priv. Corp. § 53. Of course, as asserted by the authorities previously cited, proceedings in quo warranto will not be countenanced or receive the sanction of a court, as a general rule, where the act complained of is of a trivial character, or where the abuse charged may be said to be a doubtful one, or there exists any other adequate or ample remedy therefor. *Id.* § 436. Corporations are recognized

as creatures of the law, and they certainly owe obedience thereto; and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or forbidden acts, the state unquestionably has the right, and it is its duty, to object, and it may interpose by information, and wrest from the offending corporation its franchises. *Id.* § 840, 841; Cook, Stock, Stockh. & Corp. Law, § 635; People *v.* Dashaway Ass'n, 84 Cal. 114, 24 Pac. 277.

Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain. Acts 1889, p. 22 (Burns' Rev. St. 1894, § 5103). Being the creature of the law, the franchises granted to it by the state — in theory, at least — were granted as a public benefit; and in accepting its rights, under the laws of the state, it impliedly agreed to carry out the purpose or object of its creation, and assumed obligations to the public, and such obligations it is required to discharge. Beach, Trusts, § 221; Thomas *v.* Railroad Co., 101 U. S. 71.

It certainly can be said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty towards the citizens of the city of Portland, and their duty towards it, may be said to be somewhat reciprocal; and any dealings, rules, or regulations between it and them which do not secure the just rights of both parties cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially, so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it, and complied with the company's reasonable regulations and conditions. Portland Natural Gas & Oil Co. *v.* State, 135 Ind. 54, 34 N. E. 818, and authorities there cited; People *v.* Chicago Gas-Trust Co., 130 Ill. 268, 22 N. E. 798; Chicago Gaslight & Coke Co. *v.* People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; Milling Co. *v.* Mendenhall, 142 Ind. 538, 41 N. E. 1033; Telephone Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Same *v.* Falley, 118 Ind. 194, 19 N. E. 604; Same *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035; 8 Am. & Eng. Enc. Law, 614.

In the appeal of Thomas *v.* Railroad Co., *supra,* Miller, J., speaking as the organ of the court, said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the

due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions — which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes — is a violation of the contract with the state, and is void, as against public policy."

While appellee, by the agreement in controversy, cannot be said to have fully renounced autonomy, still it did so to the extent at least, that it thereby disabled itself from supplying persons with gas who were patrons of the other company. That, by entering into this agreement and carrying it into execution, appellee violated the law and clearly abused the rights and powers conferred upon it by the state, and may be said to have offended against the law of its creation, there can be no question. Such an illegal act or agreement upon the part of a corporation like appellee cannot be permitted to override the law, and it was the manifest duty of the state to interpose, as it has done, and call it to account; and, if the charge made is established, a deserving penalty ought to be inflicted.

In addition to the prayer for the forfeiture of appellee's rights as a corporation, the information asks that such other relief be granted as is just and proper. The rule is well settled that a court, in cases in quo warranto proceedings, like this, if the facts justify, may, in the exercise of its discretion, render a judgment against defendant, declaring a forfeiture of its corporate franchises, or the judgment may be a forfeiture or ouster only of the right of the defendant to carry out or continue the illegal act or acts charged and established. State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279; Cook, Stock, Stockh. & Corp. Law, § 635.

From what we have said, it follows that the court erred in sustaining appellee's demurrer to the information; and the judgment is therefore reversed, and the cause remanded, with instructions to the trial court for further proceedings consistent with this opinion.[2]

[2] See State *v.* Real Est. Bank (1844), 5 Ark. 595; Darnell *v.* State (1886), 48 Ark. 321.

Appendix.

THE ACT TO REGULATE COMMERCE AS AMENDED.[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Carriers and transportation subject to the act.

SEC. 1. *(As amended June 29, 1906, April 13, 1908, and June 18, 1910.)* That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Terri-

Telegraph, telephone, and cable companies.

Railroads and water lines.

[1] An act to regulate commerce, approved February 4, 1887, and in effect April 5, 1887 (24 Statutes at Large, 379), as amended by an act approved March 2, 1889 (25 Statutes at Large, 855), by an act approved February 10, 1891 (26 Statutes at Large, 743), by an act approved February 8, 1895 (28 Statutes at Large, 643), by an act approved June 29, 1906 (34 Statutes at Large, 584), by a joint resolution approved June 30, 1906 (34 Statutes at Large, 838), by an act approved April 13, 1908 (35 Statutes at Large, 60), by an act approved February 25, 1909 (35 Statutes at Large, 648), by an act approved June 18, 1910 (36 Statutes at Large, 539), by an act approved August 24, 1912 (37 Statutes at Large, 566), by an act approved March 1, 1913 (37 Statutes at Large, 701), and by an act approved March 4, 1915 (38 Statutes at Large, 1196).

tory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Act does not apply to transportation wholly within one State.

What the term "railroad" includes. Express companies and sleeping car companies included.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable re-

What the term "transportation" includes.

quest therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

Charges must be just and reasonable.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided,* That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further,* That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

Classifications, regulations, and practices must be just and reasonable.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this

Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Free passes and free transportation prohibited.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other com-

Excepted classes.

Interchange of passes authorized.

mon carriers subject to the provisions of this Act: *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (*See section 22.*)

What terms "employees" and "families" include.

Jurisdiction and penalty for violation.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Commodities clause.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate

Carriers' duty to construct switch connections.

traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Switch connections may be ordered by the Commission.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them alike and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Unjust discrimination defined and forbidden.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or

Undue or unreasonable preference or advantage forbidden.

give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Facilities for interchange of traffic.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Discrimination between connecting lines forbidden.

Long and short haul provision.

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage

Commission has authority to relieve carriers from the operation of this section.

of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Rates reduced to meet water competition not to be raised without permission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

SEC. 5. (*As amended August 24, 1912.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carried or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Pooling of freights and division of earnings forbidden.

Amendment of August 24, 1912.

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Railroads not to own competing water carriers.

Penalty.

Jurisdiction is hereby conferred on the Interstate

Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

Commission to determine as to competition.

Orders to be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided,* Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

Commission's authority to allow ownership of certain vessel lines by railroads.

Rates of such water carriers to be filed with Commission.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is

Violators of Sherman Act not to use canal.

owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

SEC. 6. (*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.*) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges of transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges

Printing and posting of schedules of rates, fares, and charges including rules and regulations affecting the same, icing, storage, and terminal charges, and freight classifications.

which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Printing and posting of schedules of rates on freight carried through a foreign country.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Freight subject to customs duties in case of failure to publish through rates.

Thirty days' public notice of change in rates must be given.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its

Commission may modify requirements of this section.

discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Joint tariffs must specify names of carriers participating. Evidence of concurrence.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof, as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Copies of contracts, agreements, or arrangements relating to traffic must be filed with Commission.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

Commission may prescribe forms of schedules.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier shall engage in transportation unless it files and publishes rates, fares, and charges thereon.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided,* That

Published rates to be strictly observed.

"Carrier" means "common carrier."

wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

Preference and expedition of military traffic in time of war.

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

Amendment of June 18, 1910.

Commission may reject certain schedules.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Penalty for failure to comply with regulation.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Carrier to furnish written statement of rate.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States

Penalty for misstatement of rate.

and may be recovered in a civil action brought by the United States.

Name of carrier's agent to be posted.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the —— Company at —— Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

Amendment of August 24, 1912.

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

Commission has jurisdiction over rail and water traffic in certain particulars.

Physical connection between rail lines and dock of water carriers.

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these con-

necting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

Commission may determine terms and conditions of construction and operation.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

Through routes and joint rates between rail and water carriers.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

Proportional rates to and from ports.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

Through routes and joint rates between rail and water carriers from a port in the United States to a foreign country via Canal.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the

Proceedings before the Commission to enforce these amendments.

payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Carriage of freights must be treated as continuous unless stoppage is in good faith.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Liability of common carriers for damages caused by violation of this act.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

Persons claiming to be damaged may elect whether to complain to the Commission or bring suit in a United States court.

In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Officers of defendant may be compelled to testify, but shall receive immunity.

SEC. 10. *(As amended March 2, 1889, and June 18, 1910.)* That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Penalties for violations of Act by carriers, or when the carrier is a corporation, its officers, agents, or employees: Fine and imprisonment.

Penalties for false billing, etc., by carriers, their officers or agents: Fine and imprisonment.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Penalties for false billing, etc., by shippers and other persons: Fine and imprisonment.

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or grow-

ing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

Penalties for inducing common carriers to discriminate unjustly: Fine and imprisonment. Joint liability with carrier for damages.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Interstate Commerce Commissioners — method of appointment and terms.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commis-

sioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. *(See section 24, enlarging Commission and increasing salaries.)*

Commission to inquire into business of carriers and keep itself informed in regard thereto.

SEC. 12. *(As amended March 2, 1889, and February 10, 1891.)* That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement

Commission to execute and enforce provisions of this Act.

District attorneys to prosecute under direction of Attorney General.

of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Commission may require testimony and documentary evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Courts to compel witnesses to attend and testify.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Claim that testimony or evidence will tend to criminate will not excuse witness.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such

Depositions.

Commission may order testimony to be taken by deposition.

depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

When witness is in a foreign country.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Fees of witnesses and magistrates.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Complaints to Commission. How and by whom made. How served.

SEC. 13. (*As amended June 18, 1910.*) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic

or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Commission to have discretion as to manner of investigation.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time

Commission may issue orders in investigations begun on its own motion.

Complainant's interest immaterial.

be dismissed because of the absence of direct damage to the complainant.

Commission must report, stating its conclusions and order.

SEC. 14. (*Amended March 2, 1889, and June 29, 1906.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Reparation.

Reports must be entered of record. Service of copies on parties.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Reports and decisions to be published, and be competent as evidence.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Annual reports of Commission.

Commission may determine and prescribe just and reasonable rates and classifications to be observed as maximum charges.

SEC. 15. (*As amended June 29, 1906, and June 18, 1910.*) That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or

prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Commission may determine and prescribe just and reasonable regulations or practices. Commission may order carriers to cease and desist from violations found. Orders of the Commission effective as prescribed, but in not less than thirty days.

Orders in force not exceeding two years, unless suspended or set aside by Commission or court.

When carriers fail to agree on divisions of joint rate, Commission may prescribe proportion of such rate to be received by each carrier.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter

Investigation of new schedules.

upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided,* That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Commission may suspend new schedules.

Commission may extend suspension.

Burden of proof on carrier as to reasonableness of increased rates.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting car-

Commission may establish through routes and joint rates and classifications.

riers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

Limitation on power to prescribe through routes.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Shippers may designate routing.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and trans-

port it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

Unlawful to give or receive information relative to shipments.

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided,* That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Exceptions.

Penalty.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay

to the United States a penalty of not more than one thousand dollars.

Commission may determine reasonable maximum to be paid for service rendered or instrumentality furnished by owner of property transported.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Enumeration of powers in this section not exclusive.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Award of damages by Commission.

SEC. 16. (*Amended March 2, 1889, June 29, 1906, and June 18, 1910.*) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

To be enforced by courts.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any persons for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission

Findings of fact of Commission prima facie evidence in reparation cases.

shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

Petitioner's attorney's fees.

Limitation upon action.

Joint plaintiffs may sue joint defendants in courts on awards of damages.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Service of process.

Service of order of Commission.

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

Commission may suspend or modify order.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Carriers, their agents and employees, must comply with such orders.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of

either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Punishment by forfeiture for refusal to obey order of Commission under section 15.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Forfeiture payable into Treasury and recoverable in civil suit.

It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Duty of district attorneys to prosecute.

Costs and expenses to be paid out of appropriation for court expenses.

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

Commission may employ attorneys.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience

Commerce Court to enforce orders other than for payment of money.

of such order, or to enjoin upon it or them obedience to the same.

Schedules, contracts, and annual reports filed with Commission are public records, receivable as prima facie evidence. Certified copies or extracts therefrom also prima facie evidence.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public record as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

Commission may grant rehearings.

SEC. 16a. (*Added June 29, 1906.*) That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing,

Application for rehearing shall not operate as stay of proceedings, unless so ordered by Commission.

Commission may, on rehearing, reverse, change, or modify order.

or modifying the original determination shall be subject to the same provisions as an original order.

Commission may determine its own procedure.

SEC. 17. (*As amended March 2, 1889.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

Parties may appear in person or by attorney.

Official seal.

SEC. 18. (*As amended March 2, 1889.*) [*See section 24, increasing salaries of Commissioners.*] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars,[1] payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Witnesses' fees.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by

[1] Increased to $5,000 by sundry civil act of March 4, 1907, 34 Stat. L., 1311.

the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Principal office at Washington.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Sessions of the Commission.

Commission may prosecute inquiries by one or more of its members in any part of the United States.

Amendment of March 1, 1913.

SEC. 19a. That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

Investigation by Commission. Experts.

Classification and inventory.

Cost of property used for common - carrier purposes.

First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The

Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Other property.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Value of real property.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Property held for other than common - carrier purposes.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Corporate organization.

Stocks and bonds.

Earnings and expenditures.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it

Grants from United States.

Value of land grants.

shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Concessions made by carrier.

Method of procedure.

Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Prosecution and report of investigation.

Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

Documents to aid investigation.

Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the Commission in the work of the val-

Access of agents to property.

uation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

Effect of rules.

Public inspection of records.

Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

Valuation of extensions and improvements.

Reports to Congress.

To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

Information required of carriers.

Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

Notice of completion of tentative valuation.

Finality if no protest filed.

If notice of protest is filed the Commission shall

Hearings of protests.

fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Changes.

Effect of final valuation and classification.

Effect of evidence.

If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Com-

Transmission to Commission.

Action of Commission.

Modification of order.

mission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

Judgment on original order.

The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

Applicable to receivers.

Penalty.

That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

Jurisdiction of district courts to compel compliance.

It shall be the duty of every common carrier by railroad whose property is being valued under the Act of March first, nineteen hundred and thirteen, to transport the engineers, field parties, and other employees of the United States who are actually engaged in making surveys and other examination of the physical property of said carrier necessary to execute said Act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure

Supplemental Act of August, 1, 1914.

an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission.

Commission may require annual reports and prescribe method of making same.

SEC. 20. (*As amended June 29, 1906, February 25, 1909, June 18, 1910, and March 4, 1915.*) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

What reports of carriers shall contain.

Commission may prescribe uniform system of accounts.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Com-

Annual reports to be filed with Commission by September 30 of each year.

mission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Commission may grant additional time.

Penalty.

Monthly or periodical reports.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

Recovery of forfeitures.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

Oath to annual reports, how taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts,

Commission may prescribe forms of accounts, records, and memoranda, and have access thereto.

records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

Carrier to keep no other accounts than those prescribed by Commission.

Commission may employ special examiners to inspect accounts and records.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Punishment of carrier by forfeiture for failure to keep accounts or records as prescribed by Commission or to allow inspection thereof.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable

Punishment of person for false entry in accounts or records, or mutilation of accounts or records, or for keeping other accounts than those prescribed. Fine or imprisonment or both.

Amendment of February 25, 1909.

Commission may permit destruction of records.

time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Punishment of special examiner who divulges information without authority. Fine or imprisonment or both.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

United States courts may issue mandamus to compel compliance with provisions of Act.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

Commission may employ special examiners to receive evidence.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Initial carrier liable for loss or damage on through shipments.

That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability

hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided, further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided, further;* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving

Limitation of liability for loss caused by carrier prohibited.

Valuation allowed where goods are so packed that they cannot be seen.

notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

Provisions as to time for giving notice of loss, filing claim and bringing action.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Initial carrier may have recourse upon carrier responsible for loss or damage.

No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.

Amendment of January 20, 1914.

SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem

Annual reports of the Commission to Congress.

necessary; and the names and compensation of the persons employed by said Commission.

Persons and property that may be carried free or at reduced rates.

SEC. 22. (*As amended March 2, 1889, and February 8, 1895.*) [*See section 1, 5th par.*] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided,* That no pending litigation shall in any way be affected by this Act: *Provided further,* That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based,

Mileage, excursion, or commutation passenger tickets.

Passes and free transportation to officers and employees of railroad companies.

Provisions of Act are in addition to remedies existing at common law. Pending litigation not affected by Act.

Joint interchangeable five-thousand-mile tickets. Amount of free baggage.

together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

Rates to be published, filed, and observed.

Penalties.

SEC. 23. (*Added March 2, 1889.*) That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided,* That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money

United States courts to command movement of interstate traffic or the furnishing of cars or other transportation facilities.

into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided,* That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

Remedy is cumulative.

Commission to consist of seven members; terms; salaries.

Qualifications of Commissioners.

SEC. 24. (*Added June 29, 1906.*) That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full terms of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

ELKINS ACT [1]

An Act to further regulate commerce with foreign nations and among the States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SEC. 1. (*As amended June 29, 1906.*) That any thing done or omitted to be done

Corporation as well as officer or agent liable.

[1] Approved February 19, 1903 (32 Statutes at Large, 847), as amended by an act approved June 29, 1906 (34 Statutes at Large, 584).

by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such

Penalty.

Failure of carrier to publish rates or observe tariffs a misdemeanor.

Penalty, fine.

Misdemeanor to offer, grant, give, solicit, accept, or receive any rebate, concession or discrimination.

Penalty, fine or imprisonment, or both.

corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Prosecutions may be in any district through which transportation passes.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Principals are liable for acts of agents.

Rates filed or participated in by carrier shall, as against such carrier, be deemed legal.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or

offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Forfeiture may be enforced against receivers of rebates.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Persons interested in matters involved in cases before Interstate Commerce Commission or circuit court may be made parties and shall be subject to orders or decrees.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition

Court may restrain departures from published rates or any discrimination prohibited by law.

may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its

Court may compel attendance and testimony of witnesses and production of books and papers.

Immunity.

books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceedings: *Provided,* That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Expediting Act of Feb. 11, 1903, to apply in cases prosecuted under direction of Attorney General in name of Interstate Commerce Commission.

SEC. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Conflicting laws repealed.

SEC. 5. That this Act shall take effect from its passage.

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